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CERTIFICATE

SUPREME COURT OF THE UNITED STATES

October Term 1914

No. 604

DAVID YOST

vs.

DALLAS COUNTY

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF DEFENDANT.

(24,348)

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BRIEF OF DEFENDANT.

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STATEMENT OF CASE.

Plaintiff by his bill in equity filed in the District Court, Southern Division Western District of Missouri, alleges that he is the assignee of a judgment rendered in the Circuit Court of the United States

against the Defendant, which was originally founded upon bonds issued by Defendant in aid of a railroad; that the officers of Defendant county have evaded the service and failed to obey writs of mandamus requiring the levy of a tax to satisfy his judgment; and seeks, as to defendant, by this action:—

First. The appointment of some person by the Court to levy and collect upon and from the property of the tax-payers of the county, a tax to satisfy his judgment, but alleges that the property of the county is not sufficient to pay his and other judgments against it.

Second. That the judges of the County Court, Clerk of the County Court, Collector of the Revenue and Treasurer be required to appear and submit to the jurisdiction of this court, and declare their intention to faithfully perform their duties in the premises.

Third. That the County Court instanter levy the taxes for 1913, and the other officers perform the necessary duties in connection therewith.

Fourth. The Defendant, its officers and their successors be required to levy and collect each year hereafter upon taxable property of the county, a tax to pay judgment against the county.

Under equity rule 29, defendant filed the following motion to dismiss:—

> "Now comes the Defendant, as if the subpoena herein had been properly served upon it, which defendant does not admit, and moves the Court to dismiss, plaintiff's bill, for the following reasons:—
>
> First. The facts alleged are insufficient to constitute a valid cause in equity.
>
> Second. Plaintiff has a plain, adequate and complete remedy at law.
>
> Third. This Court possesses no power or authority to levy or collect a tax for the satisfaction of the judgments mentioned in plaintiff's

bill, neither has it authority to appoint or designate any other person for that purpose.

Fourth. The granting of the relief prayer for by the plaintiff would be an invasion of the Constitutional and sovereign rights of the State of Missouri, and its Citizens.

Fifth. To levy and collect the tax prayed for in plaintiff's bill would tend to deprive the State of Missouri of the right it possesses as a sovereign State, and secured to it by the Federal Constitution, and would destroy the Republican form of government guaranteed to it by that instrument."

The District Court granted this motion and Plaintiff appealed to the Circuit Court of appeals for the eighth circuit.

The last mentioned Court, in substance, certified to this Court, the questions:

1. Has a District Court of the United States jurisdiction, as a court of equity, of such a cause?

2. Has such District Court under the facts in this case, jurisdiction and authority in equity to appoint some person to apportion and collect from persons and property in a county, taxes for the payment of a judgment against the county, where the officers of the county, whose duty it was to do so, have refused to levy a tax for its payment, and have evaded the service and disobeyed writs of mandamus commanding such a levy?

DEFENDANT'S BRIEF AND ARGUMENT.

Since both questions submitted to this Court involve the power of the District Court to grant the relief sought by plaintiff, and, as we view them, the answer to each, and the reasons therefor, will be the same, in many respects at least, we will consider both questions together.

For at least two reasons we believe a negative answer should be returned to both questions.

First. Plaintiff has a remedy at law, and

Second. The appointment of a commissioner or other person to apportion and collect taxes, would be an exercise of the taxing power, which does not belong to the District Court.

I.

Remedy At Law.

The judgment which Appellant seeks to have satisfied is one recovered in a common law cause, and Section 916. Revised Statutes of the United States, provides:

> "The party recovering a judgment in any common-law cause in any Circuit or District Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such Court is held."

Mandamus is the proper remedy both in the State Courts of Missouri and in the Federal Courts to compel a municipality to levy a tax to satisfy a judgment.

Baker v. Fraker, 166 Mo. 130.
Knox County v. Aspinwall 24 How. 376.
Riggs v. Johnson, 6 Wall. 166.

Dillon on Munic. Cor. (Last Ed.) Sec. 1507, says:

> "Mandamus and not a bill in equity is, as will be presently stated at length, the proper mode of compelling the performance by a municipality, of the duty of levying a tax to pay a judgment against it."

That writ in such a case is in the nature of an execution.

Chanute City v. Trader, 132 U. S. 211.
Harshman v. Knox County, 122 U. S. 318.

And in Hein v. Levee Commissioners, 19 Wall, *l. c.* l. c. 660, it is said:

"Mandamus is essentially and exclusively a common law remedy, and is unknown in equity practice."

No Jurisdiction or Relief In Equity, If a Legal Remedy.

Section 723, Revised Statutes of the United States, declares:

"Suits in equity shall not be sustained in any case where a plain, adequate and complete remedy may be had at law."

The Rule Is Unaffected by the Failure of the Legal Remedy to Produce Results.

But it is said that owing to the action and in-action of the County Officials, who are in no sense the county, the legal remedy has heretofore been, and it is assumed will continue to be, ineffectual, and, hence, it is argued there is no legal remedy. The conclusion, we submit, is unwarranted. The failure of the instrumentalities, appointed by law, to make mandamus effectual, does not destroy the remedy. Public agents may, and often do, fail us, and thereby defeat for the present, the accomplishment of given ends; but the authority, under which they should have acted, yet remains. The different functions of government must rest upon the actions of designated men; and although there may be failures to act, the scheme of government remains complete. In Missouri, the Constitution provides that the accused in criminal prosecution, "shall have process to compel the attendance of witnesses in his behalf." If a witness should evade the service of a subpoena or attachment issued in his behalf, or refuse to obey either, would his case be indefinitely postponed, or reversed, because the process had been ineffectual?

There is a distinction between a remedy and its fruits. When a means suited to a desired end has been provided, the full requirement has been met. This

has been made so clear by this Honorable Court, that no possible doubt can exist of its correctness.

In Reeves v. Watertown, 19 Wall. 107, a case like the one at bar, where several writs of mandamus had been unavailing because of the resignations of some of the officials to whom they were issued and the refusal of others to obey them, this Court said:

> "We apprehend also that there is some confusion in the plaintiff's proposition, upon which the present jurisdiction is claimed. It is conceded, and the authorities are too abundant to admit of question, that there is no chancery jurisdiction where there is an adequate remedy at law. The writ of mandamus is, no doubt, the regular remedy in a case like the present, and ordinarily it is adequate and its results are satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that by means of the aid of afforded by the legislature and by the devices and contrivances set forth in the bill, the writs have been fruitless, that, in fact, they afford him no remedy. The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding."

Again in Hein v. Levy Commissioners, *supra*, it is said:

> "The hardship of the case and the failure of the mode established by law, is not sufficient to justify a court of equity to depart from all precedents, and assume an unregulated power of administering abstract justice at the expense of well settled principles."

In Thompson v. Allen County, 115 U. S. 550, the Court in speaking of the intervention of a court of equity because of the inadequacy of the remedy at law, said:

"By inadequacy of the remedy at law is here meant, not that it fails to produce the money, (that is a very usual result in the use of remedies) but that in its nature or character it is not fitted or adapted to the end in view.

II.

The Appointment of a Commissioner or Other Person to Apportion and Collect Taxes Involves An Unwarranted Exercise of the Taxing Power.

We contend that there is no power of taxation except that given by the legislature; that when authorized, it can only be exercised in strict conformity to the power given, and alone by the person or tribunal authorized by the legislature to exercise it; and that no such power has been conferred upon the Federal Courts, either as Courts of law or Courts of equity.

In Cooley's Constitutional Limitations, 3rd. Ed. star page 525, it is said:

"The power inherent in the government to tax lies dormant until a constitutional law has been passed calling it into action, and is then vitalized only to the extent provided by the law."

The following laws of a general nature were in force in 1871.

Wagoner's Statutes, 1870:

Sec. 9, p. 1166, required the Assessor to give notice through a newspaper of the time and place when he would be in each township, and made it

"The duty of every property holder within said county to deliver to the assessor written or printed lists of all property owned by him, or over which he shall have the charge or management."

Sec. 10, p. 1167; declared that

"The assessor shall commence on the first Monday in September in each year, * * *

to receive the lists of taxable property from the tax payers of his county."

Sec. 37, p. 1171, required the assessor to make his book in two parts:

"The first to be known and denominated the 'land list,' which shall contain all lands by him assessed . . . Part second shall be known and designated as the 'personal list', which shall contain a list of all persons liable to assessment, alphabetically arranged, and the assessor shall set opposite their names the personal property respectively owned by them."

Sec. 39, p. 1172:

"The assessor shall value and assess all the property on the assessor's book, according to its true value in cash . . . Each kind of property shall be assessed separately from every other; but first, the number of horses and their valuation; second, the number of mules and asses, and their valuation; third, the number of cattle and their valuation; fourth, the number of sheep, and their valuation; and fifth, the number of hogs and their valuation, shall be entered in separate columns; but clocks, watches, carriages and household furniture, money, notes, bonds and other credits, and all other personal property, shall be entered in one column."

Sec. 10, p. 1161:

"There shall be annually levied, assessed and collected on the assessed value of all real estate and other property subject by law to taxation in this State, one-fourth of one per centum for State revenue."

Sec. 76, p. 1196:

"The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties by a tax upon all property . . . made taxa-

ble by law for State purposes, except what is herein excepted by this act; but the county tax shall in no case exceed the State revenue tax on the same subjects of taxation more than one hundred per centum for the same time."

The county clerks were required to extend the taxes and make the tax books by other sections of the same law. To enforce the payment of taxes, the collector was authorized by the same Statute to seize and sell the personal property of the tax-payer, and, after giving notice by publication in a newspaper thereof, to obtain an order from the County Court for a sale of land on which the taxes were unpaid; and, after notice given, sell the same at public sale. But the owner was permitted to redeem at any time within two years.

There was also in 1871, a general law, which permitted County Courts to take stock in railroad companies. The section following that containing such authority, and it is under that section that plaintiff contends that he is entitled to a levy of taxes to satisfy his judgment, we quote, in part:

Section 18, p. 338. General Statutes 1865; also found in Wagoner's Statutes:

"In order to raise funds to pay the installments which may be called for from time to time by the board of directors of such railroad, it shall be the duty of the county court . . . making such subscription, to issue their bonds, or levy a special tax upon all property made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in the county . . .; but the total amount of tax levied for railroad purposes in any one year, in any county, shall not exceed thirty per centum of the subscription made by such county."

Present Missouri Tax Laws.

Article X, Sec. 1, Constitution of Missouri, declares:

> "The taxing power may be exercised by the General Assembly for State purposes, and by counties and other municipal corporations, under authority given them by the General Assembly, for county and other corporate purposes."

Revised Statutes of Missouri, 1909, provide: Section 11348:

> "The assessor shall between the first days of June and January . . . proceed to take a list of the taxable personal property in his county . . . and assess the value thereof."

Section 11371:

> "Real estate shall be assessed at the assessment which shall commence on the first day of June, 1893, and shall be required to be assessed every year thereafter."

Section 11370:

> "The assessor . . . after diligent efforts for ascertaining all taxable property in his county, shall make a complete list of all the taxable property in his county, to be called the assessor's book."

Section 11384:

> "The assessor shall value and assess all the property on the assessor's book according to its true value in money at the time of the assessment."

Section 11334:

> "For the support of the government of the State the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section." (The ex-

emptions are properties of the United States, this State, county, etc.)

Section 11420:

"The county court shall ascertain the sum necessary to be raisel for county purposes and fix the rate of taxes on the several subjects of taxation so as to raise the required sum."

Section 11421:

"Whenever the county court ascertains the amount to be raised for county purposes, and fixes the rate of county taxes, it shall cause the same to be entered of record."

Section 11425:

"As soon as the assessor's books shall be corrected and adjusted, the clerk of the county court * * * shall within ninety days thereafter, make a fair copy thereof, with the taxes extended therein * * for the use of the collector."

Section 11461:

"The collector shall diligently endeavor and use all lawful means to collect all taxes which they are required to collect in their respective counties (all state and county taxes), and to that end they shall have the power to seize and sell goods and chattels of the person liable for taxes as * * * sold under execution."

Section 11482:

"All real estate upon which the taxes remain unpaid on the first day of January, annually, shall be deemed delinquent and the collector shall proceed to enforce the lien of the State thereon, as required by this chapter."

Section 11491:

"As often as any delinquent tax list or tax bills shall be received by the county court * * * from the collector, the same shall be made by

the county clerk, * * * into a "back tax book." * * * the collector shall proceed to collect the taxes due thereon, but shall not bring suit thereon for one year after such taxes become delinquent."

Section 11497:

"If, on the first day of January of any year, any of the lands or town lots contained in said "back tax book" remain unredeemed, it shall be the duty of the collector to proceed to enforce the payment of the taxes * * * by suit in a court of competent jurisdiction of the county where the real estate is situated, * * * and for the purpose of prosecuting suits under this chapter, the collector shall have power, with the approval of the county court, * * * to employ such attorneys as he may deem necessary."

Section 11498:

"All actions commenced under the provisions of this chapter shall be prosecuted in the name of the State of Missouri, at the relation and to the use of the collector and against the owner of the property. * * * In all suits under this chapter, the general laws of the state as to practice and proceedings in civil cases shall apply, so far as applicable and not contrary to this chapter."

Section 11499:

"The judgment, if against the defendant, shall describe the land upon which the taxes are found to be due, * * * and a special fieri facias shall be issued thereon, which shall be executed as in other cases of special judgment and execution."

It is thus seen, that the county assessor assesses all property for taxation, and after the County Court has levied the taxes, the county clerk is required to extend all such, state, county, etc., in a tax book, this book is delivered to the collector of revenue, who is required to collect the taxes. If the taxes are not paid, the collector may, under the authority

of the books in his hands, levy upon and sell the personal property of the delinquent taxpayer. A lien exists on real estate for the tax thereon, and if the collector is unable to collect such taxes by the sale of personal property, the county clerk, after the same has been returned delinquent by the collector, places such land in a "back tax book," and after remaining delinquent one year, the collector is authorized to employ attorneys, with the approval of the County Court, and institute suit against the several owners separately, in the circuit court of the county where the land lies, to foreclose the lien thereon and sell the land to pay the tax and costs. Such suits are prosecuted as other actions, and upon judgments recovered in such actions executions are issued and the land sold by the sheriff and conveyed to the purchaser by a sheriff's deed. Articles 6, 7, 8 Chapter 6, 3 Vol. Revised Statutes of Missouri.

It will be seen by the above, that at no time has the Legislature authorized any tribunal but the County Court to levy a county tax; that the county clerk acts pursuant to the order of the County Court, and he alone can extend the taxes and prepare the tax books; that both State and county taxes are derived from the same property, and the collector, only, is authorized to collect them.

Can the District Court exercise such powers? In State Ex Rel., v. Fort, 178 Mo. 518, this is pertinently said:

> "The question of the right of a party litigant before the Court is one thing; the question of the Court's power and authority in that case is quite another."

In Pomeroy's Eq. Juris. Vol. 1, 1st. Ed., Sec. 131, we find:

> "The question whether a given case falls within the equity jurisdiction, is entirely different, and should be carefully distinguished from the question whether such a case is one in which the relief peculiar to that jurisdiction should be granted, or in which the equity power of the

Court should be exercised in maintaining the primary right, estate, or interest of the plaintiff. The constant tendency to confound these two subjects, so essentially different, has been productive of much confusion in the discussion of equitable doctrines. Equity jurisdiction is distinct from equity jurisprudence . . In other words, the equity jurisdiction may exist over a case, although it is one in which the doctrines of equity jurisprudence forbid any relief to be given, or right to be maintained."

The Federal Courts are Limited In Their Jurisdiction

In United States v. Hudson, 7 Cranch 32, this Court said:

> "Courts created by the General Government possess no jurisdiction but what is given by the power that created them."

It was said in Carry v. Curtiss, 3 How. 236:

> "The courts of the United States are all limited in their nature and constitutions, and have not the power inherent in courts existing by prescription or by the common law."

It was said in Stevenson v. Fain, 195 U. S. 165:

> "The Supreme Court alone possesses jurisdiction derived immediately from the Constitution and of which the legislative power cannot deprive it (United States v. Hudson, 7 Cranch, 32), but the jurisdiction of the circuit courts depends upon some act of Congress."

And in re Cilley, 58 Federal 977:

> "The constitution declares the lines within which Congress may confer jurisdiction, but the ground and limit of actual jurisdiction to be exercised by the courts are to be found in the acts of Congress and not in the constitution. It is not necessary to inquire as to the extreme limit of the constitutional scope of judicial power.

Within its scope, whatever that may be, Congress may confer jurisdiction, and so much of the constitutional grant of judicial power as is not bestowed upon the Federal Courts by the legislative provisions remains dormant. In other words, Congress is to define and describe to what extent the judicial power is to be exercised by the Federal Courts."

Courts of Equity Have Their Limits.

A court of equity is not permitted to roam whithersover the conscience of the Chancellor may lead, but is confined to fixed rules and principles.

In Snell's Principles of Equity, p. 4, it is said:

> "A court of equity is now bound by settled rules as completely as a court of law."

In Pomeroy's Equity Jurisprudence, Sec. 47; we are told:

> "It is very certain that no court of chancery jurisdiction would at the present day consciously and intentionally attempt to correct the rigor of the common law or to supply its defects, by deciding contrary to its settled rules, in any manner, to any extent, or under any circumstances beyond the already settled principles of equity jurisprudence. . . . . Nor would a Chancellor at the present day assume to decide the facts of a controversy according to his own standard of right and justice independently of fixed rules—he would not attempt to exercise the arbitrium boni viri; on the contrary, he is governed in his judicial function by doctrines and rules embodied in precedents, and does not in this respect possess any greater liberty than the law judges."

In Morris v. Parry, 110 Mo. App. *l. c.* 683, the Court said:

> "However far reaching and puissant the arm of equity may be, it has its sphere of operation to which it is confined. It supplements and aids

the law, does not invade its domain and never works for the destruction of legal rights nor in opposition thereto. 'Equity will not give a remedy in direct contravention of a positive rule of law.' Bispham's Princ. of Eq. Jur. Sec. 37. Story's Eq. Jur. Sec. 12."

In Sells v. West, 125 Mo. *l. c.* 631, the Court after stating that it was claimed by counsel,

> "That no court of equity is bound to limit itself to any rules, however venerable, in the consideration of any case brought into its forum," and that, "the only question which a court of equity is bound to solve, is the question as to what is right, and what should the parties do in good conscience," then said: "In reference to this it may be said that a court of equity has no more right to steer its course by crude notions of what is right in a particular case, than has a court of law."

In the case of Thompson v. Allen County, 115 U. S. *l. c.* 554-5, this is approvingly quoted:

> "A court of equity cannot by avowing there is a right but no remedy known to the law, create a remedy in violation of law, nor even without the authority of law. It acts upon established principles not only, but through established channels."

What the Federal Courts Say.

In re City of Chicago, 64 Fed. Rep. *l. c.* 899, it is said:

> "The power of taxation is legislative, and not judicial. Its exercise is not a judicial act, in any ordinary sense, and cannot be exercised otherwise than under the authority of the legislature."

It was said in Hein v. Levee Commissioners, *supra*:

> "The power we are asked to exercise is the very delicate one of taxation. This power be-

longs, in this country, to the legislative sovereignty."

It was declared in Campbellville Lumber Co. v. Hubert, 112 Fed. Rep. *l. c.* 722, that:

> "The courts in the absence of express legislative authority, have steadily refused to undertake even the collection of a tax lawfully assessed by the taxing authority."

Repeating the rule in the South Dakota v. North Carolina, 192 U. S. 319, this Court said:

> "A levy of a tax is not within the scope of the judicial power except as it commands an inferior municipality to execute the power granted by the legislature."

The Missouri Court Announces The Same Doctrine.

In City of Kansas v. Hannibal & St. Joseph R. R. Co., 81 Mo. *l. c.* 293, the Supreme Court approvingly quotes this:

> "The power to tax is a high governmental power . . . and when the legislature grants that high power to another tribunal, it can only be exercised in strict conformity to the terms in which the power is granted, and a departure in any material part will be fatal to the attempt to exercise it." Campbell County Ct. v. Taylor, 8, Bush. 208, 208; Westfall v. Preston, 49 N. Y. 353; Beckwith v. English, 51 Ill. 147.

DeArman v. Williams, 93 Mo. *l. c.* 163:

> "The mode of levying and collecting taxes is a matter confided to the legislative power."

State Ex Rel. v. K. C., St. J. & C. B. R. R. Co., 149 Mo. *l. c.* 645:

> "The power to levy taxes is purely statutatory and must be clearly given."

McPike v, Pen, 51 Mo. *l. c.* 65:

"It should be borne in mind that the power to collect taxes is purely statutory, and the collector can take no step which is not provided for by the statute."

No Duty Necessary to the Taxing Power Can Be Performed By Other Than the Particular Person or Tribunal Designated by Law, Upon the Theory That It Is Ministerial or Otherwise; Missouri Courts.

Apparently conceding that the power of taxation is legislative, it has been suggested, that when the legislature has provided for the levying of a tax, and an assessment has been made, even if the law does require that the levy shall be made by a designated tribunal, the tax books made by a given person and the tax collected by a particular official, such duties are ministerial acts, and such tax may be "apportioned" and the acts performed by any other person. If that suggestion is true, the power of taxation is but partially legislative. The acts mentioned are necessary parts of a whole. This court recognizes this principle, in Thompson v. Allen County, above cited, where it refused to appoint any one to collect a tax, which had actually been levied by the duly constituted authority for the payment of Thompson's judgment, although there was no one to collect it. The power in the legislature to create the authority to tax, necessarly includes the power to control its execution. As quoted above, the Missouri Supreme Court has said the taxing power "can only be exercised in strict conformity to the terms in which the power is granted." The principle has been so aptly expressed by Judge Cooley, that we repeat it: "The power to tax lies dormant until a constitutional law has been passed calling it into action, and is then vitilized only to the extent provided by the law."

In Missouri, the powers of taxation, which plaintiff seeks to have exercised, have been "vitalized" only in

the County Courts, the county clerks and the collectors. Beyond that, there is no vitality.

Assessments.

It will be noticed that the laws in 1871, when the bonds, the foundation of plaintiff's judgment, were issued required the assessor to annually take from each person a list of "all the taxable property owned by such person," and to assess and value the same at "its true value in cash;" and under the present law, the assessor is likewise required to assess both real and personal property each year; to require each person "to make a correct statement of all taxable property owned by such person;" and to "assess and value" the same "according to its true value in money." It is contended that the assessment has already been made upon which plaintiff contemplates the collection of a tax under the authority of this action. Whether it is meant an assessment that was made when the bonds were issued, which of course, could have only embraced property then in existence, (and we do not think that is meant), or an assessment recently made; as property is required to be annually assessed, and under plaintiff's bill he contends that he is entitled to a levy of but $70,500 annually, which will not nearly satisfy his judgment, it is difficult to understand how any assessment now in existence can be the basis for the relief plaintiff asks.

Judicial Questions Involved.

In 1871, the State revenue in Missouri was derived from a tax "on all real estate and other property subject to taxation, and the county from a tax levied on property made taxable by law for state purposes." For the satisfaction of his judgment, it is contended that plaintiff is entitled to taxes "apportioned" and collected under section 18, page 338, General Statutes of 1865, (Plaintiff's bill refers to the same section in the Statutes of 1855). This is that section, in part:

> "In order to raise funds to pay the installments which may be called for from time to time

by the board of directors of such railroad, it shall be the duty of the County Court, making such subscription, to issue their bonds, or levy a tax upon all property made taxable by law for county purposes, **and upon the actual capital that all merchants and grocers and other business men may have invested in business in the county,** but the total amount of tax levied for railroad purposes in any one year, in any county, shall not exceed thirty per centum of the subscription made by such county."

If this section is to govern, a mere glance at it, will not only show that the levying of a tax under its unusual provisions, will require the exercise of the judicial mind, but require the judicial determination of delicate and difficult questions.

The levy must be upon "all property made taxable by law for county purposes." **As seen above,** that covered all actual property and probably embraced the property assessed at "its value in cash," by the assessor, and found on the assessor's books. But that does not end the matter; for the language of the statute is mandatory, that the levy must be upon property taxable for county purposes, "AND upon the ACTUAL Capital that ALL merchants and grocers and other BUSINESS Men may have INVESTED in BUSINESS in the county."

It was not the property or business that these "men" had in the county, but "the actual capital" invested.

What is Actual capital? Who are business men? The Hod carrier? The Farmer? **The Banker? The** Preacher? The Lawyer? What is invested? What is business?

What amount did the county subscribe to the railroad company?

It is at once apparent that it will require more than a mere ministerial act to levy or apportion a tax under the above statute; and, we believe, under the present laws of Missouri.

Missouri Courts.

We understand, that when the highest court of a State has construed its revenue laws, the construction is followed by the Federal Courts.

Lewis v. Monson, 151 U. S. 549, and many others.

It seems to us, that the cases we quote below come within the rule last mentioned.

Actual Levy of Taxes Necessary.

The act of the legislature providing for the imposition of a tax, does not constitute a levy, as has been suggested, but it must be formally made. The Missouri Statutes require a levy, and the Supreme Court says it is essential.

In the City of Kansas v. Hannibal & St. Joseph R. R. Co. 81 Mo. *l. c.* 294, (facts given below), the court said:

> "Assessment for taxation is one step, but levying the taxes is another and different step. . . . . The levy is made by an order in writing by the person, or tribunal, authorized to make it, imposing the tax upon the property which has been regularly assessed as taxable property. The act of the assessor in listing and valuing the property with his return of the same to the tribunal empowered to levy the taxes, does not constitute a levy of taxes. The formal act of imposing the taxes upon the property, is an essential and indispensable step in the imposition of the burden upon the property."

Levy of Tax Not a Ministerial Act To Be Performed By Other Than Designated Persons.

In State Ex Rel, v. Kansas City, St. Joseph & Council Bluffs R. R. 149 Mo. *l. c.* 645, where the statute provided, that upon receipt of the action of the State Board of Equalization, assessing railroad property, the county court should

> "Ascertain and levy the taxes for state, county .... and school purposes, and for the erection of public buildings, and for the purposes of levying school taxes and for the erection of public buildings, ... the several county courts shall ascertain from the returns in the office of the county clerk (the law required all school districts to make returns of the amounts levied, in writing, to the county clerk) the average rate of taxation levied for school purposes, and also the rate of taxation levied for the erection of public buildings. .... Such average rates for school purposes shall be ascertained by adding together the local rates of the several school districts in the county, and by dividing the sum thus obtained by the whole number of districts levying a tax for school purposes,"

the Supreme Court said:

> "The ascertainment of the amount and levy of the county court was judicial in its character."

The City of Kansas vs. the Hannibal and St. Joe Railroad Co., 81 Mo. 285, was an action by the plaintiff, city, to recover from the defendant, railroad company, taxes for the years 1868, 1869, 1870, 1871 and 1873, the Supreme Court found that under the then law, it was the

> "duty of each city council to certify to the clerk of the county court the rate per cent levied by such city on all other property for municipal purposes, and, of the county court immediately thereafter, to ascertain and levy the taxes for county, municipal, township, city or incorporated town and school purposes, and of the clerk to certify to the railroad company the amount of taxes so levied."

The county court made no levy of taxes on defendants property for the years mentioned. And while the county clerk certified the amount of taxes to the railroad company, he testified, that so far as city

taxes were concerned, he made it from the certificate furnished by the city clerk as to the rate of taxation. The court said:

> "It is contended by respondent (City) that this was but a ministerial act, a mere extension of city taxes on the property of the railroad company, and therefore, properly done by the court's ministerial officer . . . . The clerk is not the county court, and when the county court is required, as a judicial tribunal to do an act, the record must show that it was done by the court, and the clerk, neither in term, nor in vacation of the court can perform it, 'The tax, of course must be levied by the tribunal or person to whom the power is delegated.' Black on Tax Titles. (2nd. Ed.) page 225; Dillon's Municipal Corporations (2nd Ed.) 610. In this case there was no levy of the taxes whatever. The requirment that not only that the levy of the taxes shall be made, but that it shall be made by the very person or tribunal to whom the power is confided by law is essential and vital, and no claim for taxes which have not been so levied can be maintained. * * *"

In the St. Louis and San Francisco Railway Co. v. Apperson, 97 Mo. 300, a case involving the proper levying of taxes, and in which the Kansas City case was approved, the court said:

> "Whenever, by legislative enactment, power is confided to a particular person or tribunal to perform specified acts, especially acts relating to the exercise of the important power of taxation, such legislative enactment is mandatory in its nature; its conditions must be strictly observed, and such power in order to its validity, must be exercised and exercised only by the persons or tribunal upon whom or on which it is in terms confided. This doctrine is recognized everywhere and disputed nowhere."

These cases constitute a clear negative answer to the question submitted to this court, as to the power to apportion taxes by other than the legislative appointed authority. The tax mentioned in each case had been authorized by the legislature. But it had directed that the levy be made by the County Court. That Court had made no levy, but the county clerk, its ministerial officer, had "apportioned" the tax by the tax book made. The Supreme Court said, the course followed was without the law, and the tax invalid.

Precedents In This Court.

We are not left to doubt or speculation as to the law of this case. It has been firmly settled by this Court in the many cases, of like character, heretofore determined. Reference has already been made to some of the precedents, and we again cite them with others.

Wakely v. City of Muscatine, 6 Wall. 481.
Reese v. Watertown, 19 Wall. 107, cited approvingly in South Dakota v. North Carolina, 192 U. S. 319.
Hein v. Levee Commissioners, 19 Wall. 655.
Barkley v. Levee Com. 93 U. S. 258.
Merriweather v. Garrett, 102 U. S. 472.
Thompson v. Allen County, 115 U. S. 550.
Street Grading Dist. v. Hagadorn, et al, 186 Fed. Rep. 451.

We quote from them:

Reese v. Watertown; In this case plaintiff recovered three judgments in United States Circuit Court of Wisconsin against the defendant on bonds issued by it, to a railroad company which built the road. In 1868 executions issued on the judgments, were returned not satisfied. In the same year he caused a peremtory writ of mandamus to be issued directing the defendant to levy a tax to satisfy his judgments, but before the writ could be served a majority of the members of the City Council resigned. This the

marshal so returned; in 1869, another board having been elected, plaintiff procured another writ of mandamus to be issued which was served on all the aldermen but one who was sick. No steps were taken to comply with the writ. An order was issued requiring the aldermen to show cause why they should not be punished for contempt, but before its return day six of the aldermen resigned leaving one more than a quorum of whom the one who had not been served was one. Various proceedings were had, and various excuses made resulting in an order requiring the tax to be levied at once. Before the order could be served another member resigned, leaving the board without a quorum. Nothing was accomplished in aid of plaintiff. In 1870 the plaintiff obtained a third writ of mandamus, which resulted as the former ones by the same means on the part of the officers. A special election was held to fill the vacancies caused by the aldermen resigning, but no votes were cast except three in one ward, and the person elected there refused to qualify. It was claimed that the State Legislature had passed certain laws which aided defendant in evading the payments of the judgments.

Plaintiff asked the court, as a court of equity, to subject the taxable property of the city to the payments of his judgment, alleging that the corporate authorities were trustees for the creditors of the city and the property a trust fund for that purpose, and that the marshal be empowered to seize and sell sufficient property to satisfy his judgment.

The court said:—

> "We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially it is beyond

the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important. The question is not entirely new in this court. * * * The appropriate remedy of the plaintiff, was and is, a writ of mandamus. Riggs v. Johnson Co., 6 Wall. 193. (73 U. S. XVIII, 775). This may be repeated as often as the occasion requires. It is a judicial writ, a part of a recognized course of legal proceedings. In the present case it has been thus far unavailing, and the prospect of its future success is, perhaps not flattering. However this may be, we are aware of no authority in this court to appoint its own officer to execute the duty thus neglected by the City in a case like the present * * * Upon the general principles of law and of equity jurisprudence, we are of opinion that we cannot grant the relief asked for. The plaintiff invokes the aid of the principle that all legal remedies have failed. The Court of Chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. The great advantage possessed by the Court of Chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally its jurisdiction is as well defined and limited as is that of a court of law. It cannot exercise jurisdiction when there is an adequate and complete remedy at law. It cannot assume control over that large class of obligations called imperfect obligations. resting upon conscience and moral duty only, unconnected with legal obligations. Judge Story says:—'There are cases of fraud, of accident, and of trust which neither courts of law nor of equity presume to relieve or to mitigate,' of which he cites many instances. I Story, Eq. Jur., Sec. 61. Lord Talbot says:—'There are cases, indeed, in which a court of equity gives

> remedy where the law gives none, but where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this Court to take it up where the law leaves it and extend it further than the law allows.' Heard v. Stanford, Talbot Cas. Temp., 174. * * *"

Barclay v. Levee Com.:

It was sought in this case to levy and collect the tax by a suit in equity in the Federal Court, because the life of the corporation had expired by limitation. Hence, there was no power in it to levy and collect such taxes, but the court said:

> "Where the debtor is a corporation it cannot seize the property of its members. This it would do if it should issue a writ to the marshal commanding him to levy a tax upon the inhabitants of municipal corporation, or upon their private property. The court has no more power in point of law to seize the property of citizens for the debt of the corporation in which they reside (except in some of the Eastern States where a different system prevails) than it has to seize the property of another corporation. Its power to issue a mandamus to compel municipal officers to perform their duty of levying a tax is a distinct power, which extends to all ministerial acts, which officers are legally bound and refuse to perform. In the recent case of Reese vs. Watertown 19 Wall. 107 (86 U. S. II., 72) we decided that the court has no general power to commission the marshal to levy taxes for the purpose of satisfying a judgment, and we refer to that case for a more full explanation of our views on this subject."

Much reliance is placed by counsel of petitioner, on the fact that taxes directed to be imposed by the acts of 1858 and 1859 were made a first lein and privilege upon the property liable thereto. We do not see how this can effect the present application."

Merriweather v. Garrett:

In 1879, the city of Memphis was in a bad financial condition, and overwhelmed with debts which it was extremely difficult to meet. The debts originated largely through bonds which had been authorized to issue for railroad purposes. Suits had been commenced against it in both State and Federal Courts. Writs of mandamus had been issued in several cases from the Federal Courts commanding the levy of a tax to pay judgments rendered therein. Other actions were being threatened; and while these conditions prevailed, the legislature of the State by a general law, repealed the charters of all cities of the population of Memphis. On the day that the law was passed, another was enacted providing for the government of such cities and establishing tax districts to raise funds for their government, but providing that such tax should be levied by the legislature and not otherwise. The law also authorized the appointment of certain commissioners and prohibited the issuance of any writ of mandamus to compel the commissioners or other governing bodies to levy a tax. At the time of the passage of the repealing act, there was a large amount of uncollected tax which the city had levied. Merriweather had been appointed back tax collector by the governor under the law.

The day before the charter was repealed, Garrett, and others filed their bill in equity alleging that the city owed them more than ($800,000;) that through the fault of the city officials, only about one-fifth of the taxes had been collected, and there was then, delinquent taxes amoutning to about $2,000,000; that the taxes collected under the writs of mandamus constituted a trust fund, and the city was a trustee for the same, but failed to make the collection.

There was a prayer for the appointment of a receiver to take charge of the assets of the city, including the tax books and the tax bills for unpaid taxes, and collect the tax levied for the payment of the judgments.

A decree was rendered for plaintiffs in the lower court. The Supreme Court reversed the decree with directions, that if the receiver has any money in his hands collected under judicial directions to pay judgments in favor of any person who is a party to this action, an order may be made appropriating the same to the payment of any such judgment.

Upon the question that the case be reversed, the opinion was unanimous, and upon the question of the appropriation of the money mentioned, the Court was divided.

The Court said:

> "When creditors are unable to obtain payment of their judgments against municipal bodies by execution, they can proceed by mandamus against the municipal authorities to compel them to levy the necessary tax for that purpose, if such authorities are clothed by the Legislature with the taxing power, and such tax, when collected, cannot be diverted to other uses; but if these authorities possess no such power or their offices have been abolished and the power withdrawn, the remedy of the creditors is by an appeal to the Legislature, which alone can give them relief. No Federal Court, either on its law or equity side, has any inherent jurisdiction to lay a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law. However urgent the appeal of creditors and the apparent hopelessness of their position without the aid of the Federal Court, it cannot seize the power which belongs to the Legislative Department of the State and wield it in their behalf."

In Thompson v. Allen County, this Court said:

> "This appeal was taken from a decree of the Circuit Court of the United States for the District of Kentucky, dismissing the bill of the appellant, who was plaintiff in that Court. The case was tried on the bill.

"The substance of the bill is that plaintiff obtained aaginst Allen County in that Court, two judgments at law, amounting to over $27,000 on coupons for inteerst on bonds issued by the county to pay for subscription for the stock of the Cumberland and Ohio Railroad Co. After executions on these judgments had been duly returned, 'no property found,' the Court, at the instance of the plaintiff, issued a writ of mandamus to the justices of the Allen County Court, under which they levied a tax of $2.08 on every hundred dollars worth of taxable property in the county to pay said judgments. That at the same time they elected J. T. Stark collector of said tax levy and made it an order that he give bond with good security, as such collector, and proceed to collect the levy and pay it over in satisfaction of the judgments. That Stark refused to give bond as required, and refused to accept and qualify, as such collector, that by reason of the hostility of the citizens and taxpayers of Allen County no one can be found in the county who will perform the duty of collector.***

"The prayer of the bill for relief is, that in as much as the complaint is without remedy at law, the Court, sitting in chancery, will appoint a receiver who shall collect these taxes, and that the money arising therefrom be from time to time, paid over in satisfaction of plaintiff's judgments, and that the several taxpayers of said county, made defendants, be required to pay into court, with like effect, the sums due by them as alleged in the bill. * * *"

The cases in which it has been held that a court of equity cannot enforce the levy and collection of taxes to pay the debts of municipal corporations began with Wakley v. City of Muscatine, 6 Wallace 481 (73 U. S. bk. 18 A. Ed. 930).

In that case the complainant Wakley had procured judgment against the city of Muscatine for interest on bonds of the city, executions had been returned "nulla bona," the mayor and aldermen

refused to levy a tax for the payment of the judgments and had used the annual tax for other purposes and paid nothing to plaintiff.

Wakley then filed his bill in equity praying a decree that the mayor and aldermen be compelled to levy a tax and appropriate so much of its proceeds, as might be necessary to pay his judgment.

This court said, Mr. Justice Nelson, that the remedy was by mandamus, at law, and "we have been furnished with no authority for the substitution of a bill in equity and injunction for the writ of mandamus"; and he adds that a court of equity is invoked as an auxiliary to a court of law in the enforcement of its judgment only where the latter is inadequate to afford the proper remedy.

By inadequacy of the remedy of law is here meant, not that it fails to produce the money (that is a very usual result in the use of all remedies) but that in its nature and character it is not fitted and to the end in view. This is clearly stated in the next case in this Court on the same subject, namely, Rees v. Watertown, 19 Wallace 107 (86 U. S. bk. 22 L Ed. 72).

The Court then reviews other cases and continues:

"But though the question was not then decided in Merriweather case, and is urged upon us now, we see no more reason to hold that the collection of taxes already assessed is a function of a court of equity than the levy or assessment of such taxes. A court of law possesses no power to levy taxes. Its power to compel officers who are fully appointed for that purpose, in a case where the duty to do so is clear, and is strictly ministerial rests upon a ground very different from and much narrower than that under which a court of chancery would act in appointing its own officer either to assess or collect such a tax.

"In the one case the officer exists, the duty is plain, the plaintiff has a legal right to have

these officers perform their duty for his benefit, and the remedy to compel this performance, namely: the writ of mandamus, has been a well known process in the hands of the courts of common law for ages. In the other there exists no officer authorized to levy the tax or to collect when levied. The power to enforce collection when the tax is levied, or to cause it to be levied by existing officers, is a common law power, strictly guarded and limited to cases of mere ministerial duty, and is not one of the powers of a court of chancery. It would require in this court not a compulsory proces sagainst some existing officer to make him perform a recognized duty but the appointment by the court of such an officer and a decree directing him what to do. In the one case his power proceeds from the court which first makes its own decree, and makes an officer to enforce it. No such power has ever yet been exercised by a court of chancery. The appointment of its own officers to collect taxes levied by order of a common law court is as much without authority as to appoint the same officer to levy and collect the tax. They are parts of the same proceeding, and relate to the same matter."

Other Reasons.

As we see it, there are other reasons of the most substantial character, why the District Court cannot exercise the power of taxation as sought in the case at bar.

Would Interfere With State's Right of Existence.

Relation of Counties to the State.

In Ray County v. Bentley, 49 Mo. 236, it is said:

> "Counties have not the powers of corporations in general. They are mere quasi corporations, political subdivisions of the State, and they act in subordination to and as auxiliary to the State government."

In Hannibal and St. Joe Railroad Co. v. Marion **County, 36 Missouri, *l. c.* 303, it was said:**

> "A county is a political division, and denominated **a quasi corporation; it assumes in itself some of the duties of the state in a partial or** detached form and is to be considered in the light of an auxiliary of the government and as a secondary trustee of the people."

In State v. Leflingwell, 54 Missouri, *l. c.* 472, we are told

> "The county is a political agency or quasi corporation, instituted for convenience and to carry out the purpose of the government."

In the opinion of the Supreme Court, 55 Mo. *l. c.* 296, it is declared:

> "Counties are subdivisions of the State for governmental purposes."

In Washer v. Bullet County, 110 U. S. *l. c.* 564, this is approvingly quoted:—

> "A county is one of the territorial divisions of a State created for public political purposes connected with the administration of the State Government."

In view of the fact that counties are parts and agencies of the State created for governmental purposes, and that the republican existance of the State is maintained by and through the counties and taxes derived from property therein, for the Federal Government to step in and assume a governmental power, which belongs to the State, by exercising the power of taxation and laying hold of its subjects, would be an invasion of the rights of the State; contrary to the principles of equity and inconsistent with the guarantee of a republican form of government made in the Federal Constitution to the States. To lay hold of the State's agencies and means of maintaining itself, would be to lay hold of the State. For an agent appointed by the Federal Court, and the State by its officials to enter the same field and attempt to levy and collect a tax from the same prop-

erty, would at once create a conflict and confusion indeterminable. If the State, through its agent, the county, should be required to surrender to the Court's agent the property to be taxed, the State's very life would be endangered if not destroyed, as that which happens in Dallas County may occur in every other county. The rights of no individual are paramount to the rights of the public to an untrammeled government.

In Hein v. Levee Commissioners, *supra*, the Court declared:—

> "That it is not only not one of the inherent powers of the Court to levy and collect taxes, but is an invasion by the judiciary of the Federal Government of the legislative functions of the State Government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can forsee."

Snell's Principles of Eq., page 16, says that the rights enforcible in equity must be:—

> "Capable of being judicially enforced, and the enforcement of which would not occasion a greater detriment or inconvenience to the public than would result from leaving them to be disposed of in foro conscientiae."

In Pomeroy's Eq. Jur., Sec. 131, we are told:—

> "Equity jurisdiction may exist over a case, although it is one which the doctrines of equity jurisprudence forbid any relief to be given, or any right to be maintained."

The State's Right to Regulate the Transfer of Property Within Its Bounds.

In case an agent is appointed to levy and collect the tax as sought by appellant, how will he proceed? Will he be authorized to seize and sell the personal property of the tax-payer without giving him an op-

portunity to be heard? The individual owes appellant nothing. How will its payment be enforced against real estate? If an action against the several land owners is necessary, appellant, by this proceeding, will not avoid, but invite a multiplicity of suits. Will the Federal Court, regardless of the amount involved and the residences of the parties, have jurisdiction of such actions, or will they be brought in the State Court? And if in the latter, what effect will the rule have, announced by its Supreme Court in the Apperson case, that the "doctrine is recognized everywhere, and disputed nowhere" that a tax to possess any validity must be imposed only by the person authorized by the Legislature to impose it.

Fully realizing that the Federal authority is paramount where it is authorized to act, yet either because of the want of power or the failure to exercise it, and whether it be the one or the other is not material to the immediate question in hand. Congress has not legislated on this question, and, hence, the only statute we have governing the power of taxation and the transfer of title to property thereunder, is the State law. As "equity follows the law," and never works for the destruction of legal rights nor in opposition thereto, it cannot supersede a positive state statute, and especially one governing the conveyance of property in the state.

The right of the states to control the disposition of property within their territory and the inability of a rule in equity to effect that right, has been definitely determined by decisions of the Federal Courts, which, so far as we are advised, stand unshaken.

In Allerton Co. v. Ives, 22 Fed. Rep. l. c. 895, it is said:

> "Each state has the right to regulate the transfer of property, both personal and real, within its jurisdiction."

To the same effect is Harvey v. Rhode Island Locomotive Works, 93 U. S. 664.

It was said in Brine v. Hartford Fire Ins. Co., 96 U. S. 627:

"Of the soundness of the first proposition of appellant (the right of the state to regulate the disposition of property where it lies in its borders) it would seem there can, under the decision of this Court, be little doubt.

"The earliest utterance of the Court on the subject is found in the case of the U. S. v. Crosby, 7 Cranch, 115, in which this explicit language is used:—'The Court entertains no doubt on the subject; and are clearly of opinion that the title of the land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated.' And in Clark v. Graham, 6 Wheat., 577, it said:—'It is perfectly clear that no title to lands can be acquired or passed, unless according to the laws of the State in which they are situated.'

"In the case of McCormick v. Sullivan, 10 Wheat, 192, the Court held a will devising lands in Ohio, which was made and recorded in Pennsylvania, where the devisor resided, and which was otherwise perfect, inoperative to confer title in Ohio, because it had not been probated in that State, as the law of Ohio required.

"'It is an acknowledged principle of law,' said the Court, 'that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another.'

"In the case of Watts v. Waddle, 6 Pet., 389, a question very much like the one before us arose. Watts was seeking to compel Waddle to accept a deed and pay for land which he had sold him many years before, the relief sought being in the nature of specific performance. It was objected that Watts could not convey a good title to a part of the land which he claimed to receive from the heirs of Powell by a decree rendered in the Circuit Court for the District of Kentucky. And although the proper parties were before the Court, and a conveyance had been made to Watts

by a commissioner appointed by the Court, it was held that, as no statute of Ohio recognized such a mode of transferring title, the deed of the commissioner was wholly ineffectual. It will be seen that here was a court of equity, proceeding according to its usual forms, transferring title from one party to another, both of whom were before the Court, yet its decree held wholly ineffectual under the principle we are considering.

"We will close these citations by using the language which had the unanimous assent of the Court in the recent case of McGoon v. Scales, 9 Wall. 23 (76 U. S. XIX, 545):—'It is a principle too well established to admit of dispute at this day, that to the law of the State in which the land is situated must we look for the rules which govern its decent, alienation and transfer, and for the effect and construction of its conveyances.'"

Direct Taxation.

It is difficult to understand why this is not an effort to accomplish indirectly that which cannot be done directly, namely: The exercise by the Federal Government of the power of direct taxation, which is prohibited by Section 9, Article 1, of the constitution of the United States.

Pollock v. Farmers Loan & Trust Co., 158 U. S. 601.

To sustain the right to exercise the power invoked by appellant, it must be successfully maintained that the Federal authority is at liberty to do for others what it is prohibited from doing for itself. Congress, of course, cannot impart to its creature, the District Court, a power which it itself does not, under the circumstances, possess.

Although not so stated, this question may have been in the Court's mind when in a case like this, Hein v. Levee Commissioners, *supra*, it said:

"The power we are asked to exercise is the very delicate one of taxation. This power belonging in this country to the legislative sov-

ereignty, State ora Ntional. In the case before us, the National Sovereignty has nothing to do with it. The power must be derived from the legislature of the state."

Equity Rule Eight.

The levy and collection of taxes, as asked by plaintiff, cannot be justified under equity rule No. 8. That rule is as follows:

"Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the district court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate, upon the return of non est inventus, to compel obedience to the decree. If a mandatory order, injunction, or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done, or done, so far as practicable, by some other person appointed by the court or judge, at

> the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him."

One of the well known, and Bispham's Principles of Eq. Sec. 29, says first and most important of equitable remedies, is specific performance.

The above rule was evidently adopted, not to meet cases like the present, but such as are indicated in the above equitable principle. The specific performances contemplated in the rule, we think, were such as are mentioned in Section 134 of Pomeroy's Eq. Jur.; and the rule in question:—

> "A conveyance to be executed, an instrument to be surrendered up and canceled, possession to be delivered, and the like."

We are confident that it can have no reference to a case like the one at bar.

FIRST. As the rule on its face is for the "enforcement of final **decrees**" and concerns equitable procedure, the order, injunction or decree mentioned evidently contemplated such as might be made in suits in equity. Plaintiff's judgment and his writ of mandamus were in proceedings at law.

SECOND. The exercise of the power of taxation being strictly a statutory power. (In re City of Chicago, 64 Fed. *l. c.* 899, and other cases cited,) and "to give a court of equity jurisdiction the nature of the relief asked must be equitable." (Fussell v. Gregg, 113 U. S. 550,) and it having been often decided that the Federal courts possess no jurisdiction to levy and collect a tax, as shown by the cases cited, the rule in question could not confer that power upon such courts. In Hudson v. Parker, 156 U. S. *l. c.* 84, the court said:

> "This court cannot indeed, by rule enlarge or restrict its own inherent jurisdiction and powers, or those of other courts of the United States or of a justice or judge of either under the constitution and laws of the United States."

THIRD. While the Supreme Court has the undoubted right to prescribe rules for the inferior courts, they are "mere forms and modes of procedure." (Brinne v. Insurance Co., 96 U. S. *l. c.* 27) and cannot create rules of law or of property.

In 11 Cyc. 474, it is said:

> "A court can make no rule which is unreasonable, which deprives a party of his legal rights or which is in contravention of a statute or of the law of the land."

In Saylor v. Taylor, 77 Fed. Rep., *l. c.* 480, where the Federal District Court had attempted by a rule to fix priority of maritime liens, it was said:

> "By virtue of this Section, (918) the courts may make rules of practice, but they cannot create rules of law, they cannot divest or displace rights or liens which owe their existence, not to process, but to the general maritime law. Rights acquired under the Statutes of the United States or under the general maritime law, which these courts are created to administer, are rules of property and it is beyond the potency of judicial power to alter them or take them away by rules of practice."

In Ward v. Chamberlaine, 2 Black 437, Clifford, J., says:

> "It cannot for a moment be admitted that any rule adopted by this court merely as such can enlarge, diminish, or vary the operation and affect of mesne or final process upon the property, of the debtor in respect of the matter under consideration."

and on page 447:

> "The lien of judgment is a rule of property which is beyond the power of this court to establish."

If the rule in question should be construed to authorize the levy and collection of a tax, it would both create the law by which that was done and a rule of property by providing for the sale and its transfer.

FOURTH. If authority exists for the adoption of a rule conferring upon courts the power of taxation, why was it declared in the various cases like the one at bar, that the courts could neither levy or collect a tax without express legislative authority, and why was not such power sustained under the authority to adopt rules? If possessed of that power, it could have been exercised in the particular case.

In Lee Co. v. Rogers, 7 Wall. 175, when to avoid the force of a statute of Iowa expressly authoriizng the court to collect a tax, it was contended that, "this practice prescribed by the State of Iowa has (had) not been adopted by the United States Circuit Court for that district," it was said that the court was "fully competent to adopt it in the particular case." The failure of the court to sustain the power of taxation in cases heretofore, under, the authority to adopt rules, is conclusive that it had no such authority.

FIFTH. The levying and collecting of a tax to satisfy a debt contracted by a municipality of a State is a matter that is solely in the control of the State, and not of the National Government. In Heine v. Levee Comm., *supra*, it was sought to effect the levy and collection of the tax by suit in equity in the Federal Courts, the Court said:

> "This power belongs in this country to the legislative sovereignty, State or National. In the case before us, the national sovereignty has nothing to do with it. The power must be derived from the Legislature of the State. * * * It is an invasion by the judiciary of the Federal Government of the Legislative function of the State."

Then certainly no rule of court adopted by the Supreme Court was ever designed to confer powers

upon a Federal Court which even Congress did not possess, nor could such a rule possess such magic.

SIXTH. Laws, clearly within the power of the State of Missouri to enact, provide how taxes shall be levied and collected, and if equity Rule 8 provides for a different method it is in conflict with the Missouri law. In Brine v. Insurance Co., 96 U. S. 627, when it was sought to have Illinois land sold pursuant to the equity rules of the Federal Court which were in conflict with the method provided by the Illinois law, the Court said:

> "Where substantial rights resting upon a statute, which is clearly within the legislative power come in conflict with mere forms and modes of procedure in the courts, the latter must give way."

No Warrant Under Missouri Laws for This Proceeding.

After saying at page 88 of his brief that the case of Thompson v. Allen County rests upon the proposition that the power of taxation is a legislative one, counsel for plaintiff then says: "We concede this." If true, that it is a legislative power, and not merely partially so, it must thence follow that the questions propounded to this Court must receive a negative answer, as the legislative authority for an apportionment by the District Court has not been pointed out. But to avoid the force of this inevitable result, and that of the authorities at hand, plaintiff, at various places in his brief, states that in Missouri the control of the taxing power has been committed to the judiciary, *supra* 88. He thus seeks to bring himself within the rule mentioned in the cases of Supervisors v. Rogers, 7th. Wallace, 175, and State v. Middle Kittitas Irrigation District, 106 Pac. Rep. 203. The courts have said that the actions taken in those cases was authorized by the express provisions of the statutes of Iowa and Washington, respectively, where the actions originated. These statutes are quoted at pages 41 and 71 of plaintiff's brief. This

Court has said that the Court's action in the Rogers case was authorized by the Iowa code, Reese v. Watertown, *supra*, and if, as contended by plaintiff, the appointment in the other case was not authorized by the Washington statutes, that case is contrary to the decisions of this Court, and, therefore, without binding force.

Plaintiff says the County Court is "in its powers but a board of commissioners having control over fiscal affairs of the county schools, roads, poor, etc." (P. 44); but in support of the point that the control of taxation has been granted to the judiciary in Missouri, he cites State ex rel v. Higgins, 125 Mo. 364, (brief, p. 88), and at page 368 of that case, the Supreme Court says: "County courts are some of the courts in which the constitution vests the judicial power of the state." That case, however, does not mention or refer to taxes or taxation in any form. So unless, in saying the taxing power is under the control of the judiciary in Missouri, it is intended to say the exercise of that power has, in a large measure, been bestowed upon the County Court, with, perhaps, authority in some other courts to inquire into its action by some method provided for, we wish to respectfully deny the contention.

Plaintiff says this power is under the "complete control of the courts, by express enactment of the legislature" (p. 40), and cites the following authorities for that statement:

The constitution of Missouri giving to the "Circuit Court superintending control over Criminal, Probate and County Courts, and all inferior tribunals in each county," (brief, p. 45); the statute, giving to the Circuit Court appellate jurisdiction from the judgments and orders of the County Courts, and superintending control over them, (brief, p. 45); the former statute, and the law we think is the same now, giving to courts generally the power to issue all writs necessary to the exercise of their jurisdiction (brief, p. 136); the statute of 1865, which he contends authorizes the levy of a tax to pay his judgment, providing that if the County Court refuses to perform the duties

required by that statute, it may be "proceeded against by writ of mandamus" (brief, p. 134).

Upon the question of the control over County Courts by the Circuit Courts, the Supreme Court has said:

Railroad v. St. Louis, 92 Mo. *l. c.* 166.

> "The Circuit Courts have a superintending control over County Courts, but that control **must be exercised according to the usages and principles of law.**"

Whether a Federal Court would have any control over the courts in Missouri under the constitutional provisions quoted, may be open to much doubt, to say the least, but granting that it, as well as the Circuit Court of the State, has such control, that control cannot be exercised by the extraordinary means sought by plaintiff, and which this Court in the Allen county case says has never "yet been exercised by a court of chancery." It must come through appeals, certiorari, injunctions, writs of mandamus, and such other methods as have been provided by law. The highest court of the state has so said, and its construction of the state law is controlling.

Can it be thought for a moment that the Circuit Court can appoint a commissioner to exercise the duties of a justice of the peace?

But the effort is not to control the County Court, and that is what the constitution and law permit, but to ignore it and take over the discharge of its duties.

In connection with plaintiff's contention that under the law in existence when the bonds, upon which his judgment is founded, were issued, authorized the issuance of a writ of mandamus to compel the levy of a tax for their payment, the language of this Court in the case of Reese v. Watertown seems appropriate:

> "The remedies for the collection of a debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantially preserved to the creditor.

> Thus a statute prohibiting the exercise of its taxing power by a city to raise money for the payment of those bonds would be void. But it is otherwise of statutes which are in existence at the time the debt is contracted. Of these the creditor must take notice, and if all the remedies are preserved to him which were in existence when his debt was contracted, **he has no cause of complaint.**"

In Street Grading District v. Hagadorn and others, *supra*, it is said the enforcement of collection through officers named in the law, is all complainants are entitled to under their contract, and accordingly is the only remedy known to the law in case of the nonpayment of the bonds.

The right to a writ of mandamus, which plaintiff says the statute provided for, is the legal remedy to which he is entitled, and would not the rule *expressio unius est exclusio alterius*, of itself be an answer to his demand in the District Court?

But time after time plaintiff asserts that the Missouri Circuit Courts are given control of taxation by "mandamus or otherwise." While we desire to be entirely temperate in the terms we use, we say such a construction is a perversion of the statute quoted. After having provided for a tax to pay the necessary administrative expenses of the county, the legislature enacted, in 1879, the section of the statute quoted by plaintiff, (p. 49) which is section 11417 of the present statutes of Missouri, and is this:

> "No other tax for any purpose shall be assessed, levied or collected, except under the following limitations and conditions, viz.: The prosecuting attorney of any county, upon the request of the County Court of such county, which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment levy and collection of other taxes than those enumerated and specified in the preceding section, shall present a petition to the Circuit Court

of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied and collected; and such Circuit Court or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with the constitution and laws of this state, shall make an order directed to the County Court of such county commanding such court to have assessed, levied and collected such other tax or taxes, and shall enforce such order by mandamus or otherwise.

"Such order, when so granted, shall be a continuous order, and shall authorize the annual assessment, levy and collection of such other tax or taxes for the purposes in the order mentioned and specified, and until such order be modified, set aside and annulled by the Circuit Court or judge thereof granting the same."

Certainly, it seems to us, the above section can be of no positive force as an authority for the relief asked by plaintiff in this action. It in no way provides for a general practice. By its very terms it is special, and the only order that can be enforced under its terms is **"such order"** as it, in express terms, authorizes. It is careful to restrict the enforcement to that single order. That order alone is within its provisions, and all other orders must depend, for their enforcement, upon some other warrant. Authority for their enforcement cannot be written into this statute, except by the legislature.

There is still another conclusive reason why the above section cannot apply to this proceeding. The bonds upon which plaintiff's judgment was rendered were, as he says in the bill herein, issued in 1871, and the above section was held by this Court in the case of Seibert v. Lewis, 122 U. S. 284, to be contrary to the Federal constitution as imparing the obligation of a contract, in so far as bonds issued before its enactment (1879) were concerned. This section and the one which preceded it were sections 7653 and 7654

in the statutes of Missouri of 1889 (7653 providing for the tax for ordinary county expenditures), and in 1893, in State ex rel. v. Ewing, 116 Mo. *l. c.* 135, it is said:

> "A noncompliance with sections 7653 and 7654 requiring levies to be made only on the order of the Circuit Court or the judge thereof in vacation, did not invalidate the levies. These sections were enacted long subsequent to the date of the bonds and have no application to levies made to pay bonds issued prior to their enactment."

If the above statute is unconstitutional as to the subject of this action and has no application to it, a construction which would make it effective in places, would be amazing.

Again at page 58, plaintiff quotes a Missouri statute enacted in 1883, Section 3012 of the Missouri statutes 1909, authorizing the appointment of receivers for "private corporations," under certain circumstances, to "manage all of the property, rights, privileges, franchises and business of such corporation," etc.

By the express terms of this law, it applies only to "private corporations" and in State ex rel. v. St. Louis Co. 34 Mo. *l. c.*, it is tersely said:

> "The county is not a private corporation, but an agency of the State Government."

Such statute merely gives legal authority for the appointment of receivers for private corporations, and is wholly inapplicable to a county.

But at page 43 of brief, it is said that "The Supreme Court of Missouri has repeatedly asserted the right of all courts of the state to control all matters of taxation, as a part of its general equity jurisdiction."

To support the above statement, the case of Newmeyer v. Mo. & Miss. R. R. Co., 52 Mo. 81, is cited. That case was to restrain the collection of an illegal tax, and the court simply announced the generally

prevailing doctrine, that a court of equity will restrain such a tax. That and the necessary parties to such an action are the only questions that it purports, or undertakes to consider or decide. The syllabus of the case contains a substantial statement of the decision, and we give it in full:

> "Tax-payers can file bills in equity to annul illegal acts of County Courts, when such acts will increase the taxation, and the State is not a necessary party to such action."

Except the Higgins case, to which we have already referred, which does not purport to touch the question of taxation, we believe no other Missouri case is cited relative to the control of the courts over taxation. Plaintiff does, however, cite Sections 1488-9 of Dillon on Munic. Corporation (brief, p. 92), where he says: "That all duties relating to the levy and collection of a tax, when the duties have been prescribed by the legislature, are within judicial control"; but the question is: How are they controlled? Let the same authority answer, Section 1507:

> "Mandamus and not a bill in equity is the proper mode of compelling the performance by a municipality, of the duty of levying a tax to pay a judgment against it."

See also Section 1513.

In view of the Kansas City and Apperson cases cited at pp. 22 and 23 of this brief, where the Supreme Court of Missouri decided—that only County Courts could levy taxes, and that the power of taxation, "in order to its validity, must be exercised and exercised only" by the duly authorized taxing power, it is not surprising that cases are not found sanctioning the exercise of the power otherwise.

Showing how completely the levy of a tax is under the control of the County Court, and that the Circuit Court possesses no power in relation thereto, as contended by plaintiff, we call attention again to the case of State ex rel. v. K. C., St. J. & C. B. R. R. Co., 149 Mo., where the County Court had erroneously

levied too great an amount of taxes against the defendant, in which it is said at page 645:

> "The ascertainment of the amount and levy of the County Court was judicial in its character, and could not be revised by the Circuit Court, by decreasing them any more than it could by increasing them."

What Section of Statute in Force in 1871.

At page 9 of this brief we quote Section 18, p. 338, of the General Statutes of Missouri of 1865; plaintiff at pages 35-6 of his brief quotes the same section, but from Wagoner's Statutes of 1870; and at pages 33 and 131, he quotes section 31, of the Statutes of Missouri of 1855. These sections are identical, except the latter part of section 31 of 1855, commencing with the words "and in case a subscription be made," etc., are not in the section as found in the 1865, and Wagoner's Statutes. As the source from which information may be obtained for a levy of tax, may have some bearing in this case, but we do not think so, the section in question may be material. We understand that it is not material when the Laclede and Fort Scott Railroad Company was organized, but the question is, what law was in force when the debt was contracted? We think that it was the law found in the 1865 Statutes that was in force in 1871, whatever may be its effect upon this case. In 1865-6 there was a revision of the laws. Section 1, p. 882, of the General Statutes of 1865, says: "This and the foregoing acts . . . shall constitute and be known as the General Statutes of Missouri." Section 2, same page, declares "The general statutes aforesaid shall take effect and go into operation from and after" August 1st, 1866, "and all acts contained in the Revised Statutes of Missouri, as revised and digested" in 1854 and 1855 contained in chapters numbered from 1 to 171, "in the published edition thereof," except such as were the same as those contained in the revision, are repealed.

We cannot see that Section 21, p. 306, Wagoner's Statutes, 1870, can apply here. By its terms, it ap-

plies to bonds "heretofore issued": That is, to subscriptions prior to 1870; and as said before, the bonds in question were issued in 1871. The evident purpose of this section was to bring bonds previously issued under the statutory provisions.

Cases Cited by Plaintiff as Precedents.

The case of Supervisors v. Rogers, 7 Wall. 175, many times cited in appellant's brief, is not applicable here, for the reason, as has been often stated, it was determined under the peculiar and express provisions of the Iowa Code, which authorized the action taken. After so stating in Reese v. Watertown, *supra*, the Court said:

> "Supervisors v. Rogers is, therefore, of no authority in the case before us."

The case of State v. Middle Kittitas Irrigation District, 106, Pac. Rep. 203, cited on page 121 of brief, was also decided under express authority of the statute of Washington.

In Stansell v. Levee Board, 13 Fed. Rep. *l. c.* 851, the legislature of Mississippi, where the action originated, not only provided in great detail for the imposition of the tax there in question, but expressly declared in the law that **"the tax is hereby levied,"** and authorized the courts to appoint some person to collect it in case the proper official failed so to do. Hence, it was said by the Court:

> "The order of the Court does not undertake to levy the tax or change it. The levy was made by the legislature in the act of incorporation."

The decree made in Post v. Taylor Co., No. 11302, Federal cases, cited in plaintiff's brief, p. 59, where debtors were required to pay tax owing by them into court, was entered by Baxter, J., who, as indicated by his comments in Garrett v. City, 5 Fed. Rep. 860, (which plaintiff erroneously calls the opinion of Justice Strong, brief, p. 92), entertained the belief that he had the authority to enter such a decree, but who,

under the superior authority of this Court notwithstanding his own views, had to dismiss the Garret (Memphis) case. He held erroneous views on the question involved.

It is a mistake to say of the case of Labette Co. Com. v. Moulton, 112 U. S. 217, cited in brief, page 123, that "the law required certain acts to be performed by the township trustee before the county judges were required to make the levy" (of tax), for this Supreme Court said in that case:

> "The concurrence of the trustee of the township is not necessary to the levy of the tax."

The tax levy considered in Hawley v. Fairbanks, 108 U. S. 551, cited in brief, page 20, was not dependent upon the certificates mentioned in the opinion. The certificates were for the purpose of imparting certain information to the county clerk, but the Court declared that he was not restricted to the certificates, and

> "There was no legal impediment to employment of some other means to give the county clerk notice of what was the duty required of him in the premises."

General Equity Powers.

Cases are cited which deal with the general powers of courts of equity in proceedings where the rights of individuals only, and not their control over public corporations, are involved, from which it is sought to extract authority for this proceeding. While the parties to, and the character of, each case must, of course, be kept in mind, we do not believe any case cited is inconsistent with any case we present. We will not attempt to mention them by name, those cited, except in a few instances, but those from this Court contain no new departure, but simply announce the rules declared long before the cases we have cited, were determined. In fact, all cases cited from this Court, except Hills v. Hoover, 220 U. S. 335, were decided before that of South Dakota v. North Carolina,

192, U. S. 319, which approves the Watertown, and other like cases.

The case of Louisiana v. U. S., 103 U. S. 292, plaintiff's brief, p. 64, did deal with the rights of a public corporation, but the question was whether the "special relief" expressly given and provided for by the General Statutes of Missouri of 1865, which applied to incorporated towns and cities only, could be given as the statute said it should be. This Court held that the relief could be granted. This relief resulted, only, from the requirement of the statute. In the case at bar, there is no such statute.

In the case of Hills v. Hoover, 220 U. S. 335, cited in brief, p. 13, and mentioned above: It was held that where the state statute or practice did not provide for the enforcement of relief given by a statute of the United States, the Federal Court may adapt its practice and issue its writs to enforce the Federal law.

That was authorized, not against the law and practice provided, but because there were none.

In the case of Pendleton v. Perkins, 49 Mo. 465, cited in plaintiff's brief at page 18 and quoted at 104, the rights of a private person were in question. He had left the state indebted to Pendleton, and left no property, and, hence, no judgment or attachment could be obtained against him. But he had left money in the treasury of the City of St. Louis, and the question was whether that money could be reached in equity, to satisfy the debt. We think the key to the whole case lies in this statement of the Court, *l. c.* 568, and which precedes the second quotation made by plaintiff from the case:

> "It seems to be satisfactorily settled upon authority that when the debtor has absconded, **so that no personal judgment can be obtained against him, and there is no statutory proceeding by which his property can be reached**, a creditor's bill, will lie in the first instance, and from the necessity of the case."

This case, as we read it, simply sustains the right of equitable garnishment, in a proper case against a private individual.

In Matters Relating to Taxation.

Farrar v. St. Louis, 80 Mo. 379, cited in brief at page 15, and other cases cited at same place with it, merely hold that special benefit taxes are not taxes in the ordinary sense, and that the provisions of the state constitution relating to taxation have no reference to them.

In State ex rel. v. Wilson, 216 Mo. *l. c.* 286-7, cited at page 37 of brief, the questions involved were "the regularity of the entry, extention and certificate of the tax assessments upon the tax books and back tax books of the county, and the regularity of the certificate of authenticity of the county clerk attached thereto." The Court quotes three sections of the Missouri statutes, which provide that the assessment of property shall not be "considered illegal on account of any informality in making the assessment" or in the tax lists or because it or the assessor's books were not made or delivered within the time required by law, and "any failure to make or complete the 'back tax books' within the time required," "or any informality in making said 'back tax books' shall in no way affect the validity of the same"; and says, because of curative statutes, it is held that defects of the character mentioned are not fatal to the taxes; that this holding is upon the principle that when a valid assessment is shown and its entry upon the tax books, a cause of action is made out, and that other requirements and proceedings are formalities to assist and facilitate the collection of the taxes, and not as hindrances to a speedy collection.

The Court's remarks relate only to the matters before it, and are based entirely upon the curative statutes quoted. The case certainly furnishes no authority for the contention that the "raising of a fund to pay the debt is a mere accountant duty."

Control of Counties by the Courts.

For the contention that cities, counties, etc., in their relations to creditors on their obligations, and in their being subject to control by the courts in the perform-

ance of their ministerial or administrative powers; and as to such matters do not belong to either department of the government, the cases of State ex rel. v. Gates, 190, Mo. *l. c.* 556, and St. Louis v. Russell, 9 Mo. 507, are cited at page 27 of plaintiff's brief.

These cases dealt with cities, only, and the first said:

> "The only questions arising here. are first, as to the power of the Legislature to enlarge the limits of the city of St. Louis, against the will of the inhabitants brought into the city by such extension; and second, the power of the city corporation, under its charter, to sell lands for the non-payment of city taxes."

In the second case the question was as to the court's right to control the legislative powers of the Common Council of Kansas City, and the court said:

> "In the exercise of their legislative powers they are not subject to judicial control, but in the exercise of their ministerial or administrative powers they have no such exemptions."

The case of Givens v. Daviess County, 107 Mo. 608, is cited in Plaintiff's brief, pp. 17, 28, 119; but to us it seems without force in this case. The plaintiff in that case had a demand against the defendant county. Under the statute he was permitted to present it to the county court for adjustment, or sue thereon in the Circuit Court. He chose the latter course; and while it was contended, that before he could do so, he must first make demand on the county court, the Supreme Court held that the statute required no such demand.

Special Appointment of Officers.

Page 30 of Plaintiff's brief cites the case State ex rel v. Sheppard, 192 Mo. 509, where a clerk was temporarily appointed by the court, and also a statute of Missouri authorizing the court to appoint some one to perform the duty of a sheriff if that

official is not qualified to act, or is interested or prejudiced. The clerk was appointed under the statute of Missouri, now section 2689, statutes of 1909, which permits a court or judge, when a charge has been filed, charging the clerk of the court over which he is the judge, with a misdemeanor in office, to "suspend such clerk from office until a trial can be had, and appoint a temporary clerk."

The right to make these appointments exists, because the statute expressly provided for them. These can, therefore, be no possible authority for any action where there is no such statute.

Appointment of a Receiver Under Attachment Law.

At the close of the appendix to his brief, Plaintiff's counsel quotes Section 30, p. 187, Wagoner's Statutes of Missouri, 1870, found in the chapter relating to attachments, which provides that, "The Court, or in vacation, the judge, may in a proper case, on the application of a plaintiff, appoint a receiver," and seems to contend that such an appointment can be made in this proceeding. It is said, that at that time, we suppose 1871, there was no statute restricting the appointment of receivers for corporations, to private corporations. There has been such a law, as heretofore seen, since 1883, in this state. The contention that such an appointment may be made, if it is so contended, is certainly a novel one. But we make some suggestions in reference to it. If counties were ever within the contemplation of that section, and they certainly never were, we think the enactment of the law in 1883 confining the appointment of receivers for corporations to those for private corporations, took them—public corporations—from it. Remedies may be altered, if the right yet remains. This change in the law, took away no property which, under the law, could be subjected to plaintiff's demand, and the writ of mandamus under the decisions of this court, affords him an adequate remedy. But under the law, quoted—the attachment law—counties are not embraced. At least in their governmental capacity, they are parts of the state, and

the consequences that would follow the taking over the property of counties, if any they possess, necessary to their maintenance, could not be contemplated. Attachments go against property, and, as shown by section 18, page 184 of the same statute, quoted in Plaintiff's brief at page 146. the writ must command the sheriff to "attach the land. tenements, goods," etc. "of the defendant." If there is no property "of the defendant," there can be no attachment. Property subject to taxation in a county, is not property of a county. It belongs to the individual taxpayers. Counties seldom have property, and in this case, it is stated in both the bill and certificate submitted by the Circuit Court of Appeals to this court, that "the county has no funds in its treasury which can be applied to the payment of the judgment, and its property is, under the laws of the state, exempt from seizure and sale under execution." Plaintiff's brief, p. 8. Suits are not maintained for the mere purpose of the appointment of receivers.

In Miller Bros. vs. Perkins, 154 Mo. *l. c.* 637 this is quoted:

> "The appointment of a receiver is not the ultimate end and object of litigation, but is merely a provisional remedy to control and preserve property. pending litigation, that the relief awarded, if any, may be effective. * * * As a necessary result of the ancillary character of the remedy, the appointment can be invoked only in a pending suit brought to obtain some other relief which the court has jurisdiction to grant. An exception to the general rule is said to exist in the case of receiverships over the estates of infants and lunatics."

The same authority at the same page, referring to the section in question, says that Circuit Courts are authorized to appoint receivers "where a writ of attachment is sued out **in aid thereof.**"

The receiver contemplated in the law in question, is one who may be appointed in a pending attachment suit only. He is evidently appointed to preserve

property "of the defendant" attached in the action. If there is no such property, there can be pending no such suit. But if it is possible that such an action can be pending, it would clearly not be a "proper case" for the appointment of a reciver. That the receiver is only for the attachment action which is pending, is demonstrated by the case of Ex Parte Haley, 99 Mo. *l. c.* 152. In an attachment suit certain property had been attached as the "property of the defendant," and Haley appointed receiver. A change of venue was afterwards granted in the action to another county. After the case was disposed of by the court to which the action was sent. and an order made by it for the receiver to deliver the property in his hands to the defendant, he declined to do so, and his counsel said, as shown by his brief, he could only be called to account by the court appointing him," but the court said:

> "The transfer of the cause by change of venue took with it the whole cause, and every incident belonging thereto, to the Ralls Circuit Court. Not a shred or a patch of jurisdiction over the cause, or any of its incidents, was left in the Louisiana Court of Common Pleas."

If it be true that the appointment of a receiver under the statute quoted by plaintiff, is incident to an attachment suit, since, as said in Lackland v. Garesche, 56 Mo. *l. c.* 270:

> "The remedy by attachment for the collection of debts in this State, is essentially legal. and not equitable, in its nature and procedure. It is founded alone upon statutory law,"

the appointment of a receiver, would be to grant plaintiff a purely legal remedy in an action in chancery.

The question of tithes is an old one (Gen. 14-20), and without entering upon the method of their collection, we understand that the English Court of Chancery exercised powers over certain charities and

other subjects which the Federal Courts do not exercise.

Foster's Federal Practice, 1st. Ed. P. 6, Sec. 5.

But under our statutes and the decisions of the courts, there can be no resemblance between tithes gathering, and our system of taxation. The decisions of our courts themselves, have made the ancient cases in relation to the collection of tithes, in-applicable.

The Suggested Similarity Between Public and Private Corporations.

We deem it unnecessary to enter upon the examination of the law of the similarity of public and private corporations. The question is: How are judgments against public corporations to be collected? Whether in some of their characteristics public and private corporations agree, it is certain that the latter ordinarily possess property from which judgments against them may be collected, either by execution or the appointment of receivers to take over their property for that purpose; while public corporations seldom own property, but judgments against them must be satisfied through the medium of taxation. In either case the established rules of law and equity must control the collection of the judgments. The private corporations are created for private purposes, and no public policy is affected by the appointment of receivers for them. Public corporations exist for public purposes, and to permit any person appointed by court, or otherwise, to interfere with their management, would affect the public and subject its rights to those of the individual. If the two methods were not true in theory, they would be true because the law has so provided. It must, therefore, follow, that in whatever respect the two corporations agree, as provided by the law and declared by the courts, a wide distinction exists in the methods of the enforcement of the payment of demands against them.

Trusts-Creditor's Bill-Multiplicity of Suits-Accounting.

If there is no power in the District Court to award the relief sought, the presence of the questions mentioned are of no importance. As quoted above from Pomeroy, Section 131:

> "Equity jurisdiction may exist over a case, although it is one in which the doctrines of equity jurisprudence forbid any relief to be given."

Quoting from Judge Story and Heard v. Stanford, this court said in the Watertown case:

> "There are cases of fraud, of accident, and of trust which neither courts of law nor of equity presume to relieve or mitigate. * * * "Where a particular remedy is given by law. and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it. and extend it further than the law allows."

However, we will notice these questions to some extent.

County a Trustee.

It is sometimes said that "a public office is a public trust," and that is no doubt true in the sense that to the official are committed certain duties to be discharged for the benefit of the public; but that is not a trust that will be enforced in equity. Perry on Trusts, Sec. 1, says:

> "The word trust, in its popular and broadest sense, embraces a multitude of relations, duties and responsibilities. Thus, executors and administrators, guardians of infants and lunatics, assignees in insolvency and bankruptcy, bailees, factors, agents, commission merchants and common carriers, as well as the officers of public and private corporations, all exercise a kind of trust.

> Indeed, one definition of a trustee is 'a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another.' This definition embraces all the trusts and offices above named, but the law in relation to many, if not all of them, is or may be administered in the common law courts. It is not of the law of such trusts that this *treatise* concerns itself."

This character of trustee a county may be. Perry on Trusts, Section 2, further says:

> "The trusts here treated are defined to be 'an obligation upon a person arising out of a confidence reposed in him to apply properly, faithfully and according to such confidence.'"

Bispham's Principles of Equity, Section 20, says:

> "A trust is the beneficial title or ownership of property of which the legal title is in another."

Under the circumstances of this case, the county cannot, we think, be a trustee of the latter class. They are the equitable trusts which can only be administered in equity. Of this class Perry, Section 17, says:

> "The *cestue que trust* has no remedy except by subpoena in chancery."

Bispham, Section 49, says:

> "A trust, in its technical sense, is the right, enforcible in equity, to the beneficial enjoyment of property of which the legal title is in another."

If the levy and collection of a tax may be compelled at law by writ of mandamus as strictly legal proceeding, how can the county be said to be a trustee? The county does not possess the property, nor have the legal or equitable title thereto.

Duty is not the equivalent of trust, and hence, the

mere fact that a legal duty devolves upon an official does not constitute him a trustee.

A county can perhaps voluntary become a trustee for a particular purpose. And in the discharge of the duties imposed upon it by law, it may become the custodian of money or property belonging to another, and thereby become a trustee. In this respect if a fund is actually received by it, collected or received for a particular purpose, as to it, it may be a trustee, but until the fund or property is received into the custody of the county, it is difficult to understand how an implied trust can arise.

It is common learning that a court of equity may remove a trustee and appoint another in his stead; but when a public corporation is a trustee, this in the very nature of things can only be done as to such trusts as do not belong to it in its quality as a public corporation. Otherwise such a court could destroy a county, or remove an official. This demonstrates the distinction between a county existing under the law for the performance of public duties, and the ordinary trustee. If because it is indebted, and the duty rests upon it to provide the means and satisfy the debt, constitutes a county a trustee for its creditor, is not each private debtor, upon whom also rests the duty to provide the means and pay the debt, equally a trustee for his creditor? Who would so contend? Such a rule would drive all action for debt into the courts of equity. To say it would not in the absence of other considerations, is to say that the mere existence of a duty relation does not give a court of equity jurisdiction, and that puts the question of a trust out of the case.

As we read them, no case cited sustains the contention that there exists a trust in the county, absent funds not actually collected. We direct attention to cases cited.

Ray County v. Bently, 49 Mo. 236, dealt with a school fund, then and long previously existing and actually in the hands of the County Court. It was created by the state, and its care and control expressly committed to the County Court by statute.

State ex rel v. County Court, 128 Mo. 435, likewise dealt with a fund actually in the custody of the county. Of it the Court said:

> "The object of the writ (mandamus) is to require of defendants, as the County Court, to apply particular funds in the treasury of the county (collected from dramshops in the township) toward the payment of certain indebtedness charged upon Mason township,"

and it was held that the funds were applicable under the law alone to the purpose for which they were levied and collected.

In Coler v. Board of Com., 89 Fed. Rep. 257, appellant's brief, p. 75, the fund was one obtained from taxes levied and actually collected for the purpose of paying bonds of which plaintiff's was a part. The funds were in the county treasury, and the county commissioners were seeking to divert them to other uses. The action was injunction against the commissioners and the treasurer to prevent that being done and to have them devoted to the purpose for which they were collected. The Court held that the funds were collected for a definite purpose and could not, therefore, be applied to any other, and were thereby impressed with a trust.

Washington Co. v. Williams, 111 Fed. *l. c.* 816, was an action in equity by a number of bond holders against the county to recover on bonds held by them, and to reach funds collected for their payment and in the hands of the county, and while Judge Sanborn dissented and held at the above page, that the funds in the custody of the county constituted a trust fund, and their application to the purpose for which they were collected ought to be enforced in that action, a majority of the Court held that an action at law was the proper remedy and a suit in equity would not lie, and dismissed the case. (See brief, p. 94-5.)

The case of Warner v. New Orleans, 175 U. S. 120, cited in brief at pages 93 and 96, form 176 U. S. 92, we believe falls far short of showing the county in

this state to be a trustee, and that appellant is entitled to the remedy he seeks:

FIRST. The City in the Warner case was deemed a trustee under both the pleadings and the opinion of the court, only because of the voluntary express contract it entered into voluntary and unconditionally agreeing to do certain things, and thereby constituting itself a trustee: Such a contract always, under such circumstances, creates a trust.

SECOND. In the case of the county there is no fund or property, but in the Warner case, the assessments, certain, fixed and definite, were present and constituted the fund.

THIRD. What analogy is there between the unexercised duty of taxation, and the assessments actually fixed and due as in the Warner case? We answer, none.

FOURTH. The court did not undertake to collect the assessments, as we understand, but merely gave plaintiff a decree for the sum due him to be paid out of the particular fund. To that he was clearly entitled. The decree was doubtless to be enforced in the usual and ordinary way by execution, if permitted, or mandamus.

FIFTH. In the Watertown case, it was contended that the City was a trustee for the creditors. A like contention was made in the case of Merriweather v. Garrett, *supra*. In Barclay v. Levee Com. *supra*, the tax to be imposed for the payment of plaintiff's demand, was made by the statute a first lien on the property liable therefor. And in the case of Thompson v. Allen Co., *supra*, the tax for the payment of Thompson's judgment had actually been levied; but in all of these cases these matters were treated as unimportant, and the Court either held that there was no trust, or if there was it could not be enforced in the manner here sought. The case of Reese v. Watertown, *supra*, was approvingly cited in the case of

South Dakota v. North Carolina, 192 U. S. 319. That is a later case than the Warner case.

Creditor's Bill.

Merely calling an action a creditor's bill, is not sufficient. It must present some enforcible equity. In Humphrey v. Atlantic Milling Co., 98 Mo. *l. c.* 551, this is approvingly quoted from Pomeroy's Eq. Juris.:

> "It is a necessary result from the whole theory of a creditor's suit, that jurisdiction in equity will not be entertained when there is a remedy at law."

Avoiding a Multiplicity of Actions.

We are unable to understand how a multiplicity of actions would be avoided by making the appointment herein contemplated. All plaintiff is required to do under the law, is to sue out a writ of mandamus, if, indeed, he has not already done so. The requirements of such writ would, perhaps, be continuing. That other creditors may subject the county to like writs, can hardly concern plaintiff. Whether they will avail themselves of that right, plaintiff does not know. To enforce the payment of taxes by an appointee, certainly some proceedings will be necessary against some tax-payers, and if that is true, a multiplicity of suits will be invited thereby.

Accounting.

An action in equity may not lie, although there are unsettled accounts between the parties.

Bispham's Prin. of Eq., Section 483, says:

> "It must not be presumed, however, that a court of chancery can draw to itself every transaction between individuals in which an account between parties is to be adjusted."

Appellant's bill does not contain allegations showing that he is entitled to relief under this head. Even if this is a character of action in which such relief may be granted, and funds shall exist in the future to be paid out, there are no facts alleged showing that the accounting cannot be had in the usual way at law.

In Benton Co. v. Morgan, 163 Mo. *l. c.* 678, it is said:

> "A petition seeking equitable relief must affirmatively show on its face by the statement of facts that the plaintiffs have no plain, adequate and complete remedy at law,"

and citing among cases, Hoey v. Coleman, 46 Fed. Rep. 221.

Upon the questions of avoiding a multiplicity of suits, accounting, and the existence of a number of creditors who have a common interest in the tax levy, saying nothing of the fact that appellant alone has become a party to this action, in the case of Merriweather v. Garrett, *supra*, all of these questions were as prominently present as they are here, but were unavailing.

Ownership of Stock and Building of Railroad.

Plaintiff's brief states at page 26 that the owners of property in Dallas county became the owners of the railroad to be built, acquired the capital stock of the railroad for the bonds and "the proceeds of the sale of the bonds was expended on the building of the railroad"; and then says "this charge is analogous to the ordinary improvement tax imposed upon certain property by the performance of conditions." And at page 125, after quoting Judge McPherson, where he says: "As I understand it, little or no part of the work was done on the railroad and the people received no benefit therefrom"; plaintiff's brief says: "There is nothing in the record of this or any other case from which the trial judge could have gained the understanding that 'little or no part of the work was done on the railroad.' This understanding was gotten from some source outside the record and is not based upon the facts." Plaintiff's statement of fact, both

at page 26 and here, are also outside the record. But as if the Court will take judicial notice of the additional statements, plaintiff at the page last given, proceeds as follows: "It is a matter of common knowledge that this railroad was graded, bridges built, and ties laid when the panic of 1873 came on," and after making additional statements, plaintiff quotes from Campbell's Gazateer of Missouri, published in 1875, in reference to what has been done on railroad in question, and also quotes from report of State Auditor as to issuance of bonds. If permissible to make such statements and quotations, we may say that it is a matter of common knowledge that, while the Laclede and Fort Scott R. R. Co. did considerable grading on the railroad, it did not complete the same, build the bridges nor place the ties thereon, and the same has never yet been constructed at any point. We also quote from the history of Dallas county as given in the History of Laclede, Camden, Dallas, Webster, Wright and other counties in Missouri, published by the Good Speed Publishing Co., in 1889, page 524, where it speaks of the railroad company mentioned and the bonds issued by Dallas county in connection therewith, and the fact that the company did receive "the bonds, or the proceeds therefrom, and did actually grade the roadbed, 'ready for the cross ties,' and erected the bridges, or a part of them, clear through the county, and then discontinued the work, so that the people have an enormous debt to pay and no 'value received' for it." It is also said in Missouri Red Book, 1912, compiled and published by the State Bureau of Labor Statistics, page 63: "Dallas is one of two counties in the state not touched by a railroad."

Conclusion.

By its plain terms and the construction given by the courts, we learn what the law is. No other guide is certain and sure. We believe we are justified in saying that by the clear enunciations of the highest judicial authority, as shown by their repeated exhaustive decisions, every question involved in the

case at bar has been solved and settled. In these decisions are found the fixed rules and principles applicable to, and that must determine this, case. As shown by the bill, it was long after the precedents had been made that plaintiff voluntarily became the owner of the judgment he now claims, and this Court has said he was bound to "take notice" of the law in existence at the time "the debt was contracted," and if the remedies then in force still exist, "he has no cause of complaint." Neither for the purpose of compelling a helpless county, grievously burdened by the act of unfaithful officials, to enter into a compromise, as intimated in plaintiff's brief at page 124, or otherwise, can the courts depart from well established principles and travel forbidden paths to meet his peculiar notions of propriety. Indeed, he who complains of the want of adherence to the requirements of the law by others, cannot consistently ask for himself, considerations not warranted by the same law, nor request the exercise of a power "never yet exercised by a court of chancery." The granting of such relief could not be "agreeable to the usages and principles of law."

J. W. MILLER,
J. S. HAYMES,
For Defendant.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 604.

DAVID YOST

vs.

DALLAS COUNTY

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF DAVID YOST, PLAINTIFF, IN REPLY.

HARRY J. CANTWELL,
Solicitor for David Yost, Plaintiff.

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BRIEF OF DAVID YOST, PLAINTIFF, IN REPLY.

Plaintiff believes that a careful examination of defendant's brief will reveal no authority cited and no argument advanced that has not been fully anticipated in the brief filed by plaintiff.

Defendant, however, devotes so much space to the proposition that a county is exempt from the ordinary remedies applicable to ordinary corporations and to trustees generally that it may not be improper to further elaborate upon the

contention of the plaintiff that the State of Missouri has made no such exemptions in favor of a county.

It cannot avail the defendant to quote language of courts applicable to the levy of a tax not authorized by the legislature, for the legislature authorized this tax.

It cannot avail the county to cite decisions holding invalid the unauthorized entry of a tax levy by a clerk—without a judicial determination that the levy was made or should be made, for there is here a judicial determination that the levy should be made—**and a conclusive judicial determination.** It cannot avail to quote expressions that the county is part of the State's government in the ordinary sense where questions of police, criminal procedure, or the raising of revenue for general governmental purposes is involved, for these expressions do not relate to the matters in issue here—where the legislature has created a special fund by authorizing a special tax and has made the agents of the county the trustees for the creditor, **when the highest judicial authority of the State holds** that the county, acting in its business capacity, is subject to the rules governing private corporations.

The defendant says that the statute quoted at page 137 of plaintiff's brief as a statute of 1855 (page 503, R. S. 1855) is not applicable because not in force at the time the debt was created. That statute in the same language was repeated in subsequent revisions and was not repealed until some years after the bonds were issued. It appears in the revision of 1865 (G. S. Mo. 1865), at page 225, as section 4 of chapter 37; in Wagner's Mo. Statutes 1870, at page 408, as section 4 of art. III, and in Wagner's Mo. Statutes **1872**, as section 4, art. III, page 408, and is as follows:

> "All actions, local or transitory, against any county, may be commenced and prosecuted to **final judgment and execution** in the circuit court of the county against which the action is brought; but no court-house, jail, clerk's office or any other public building, or the lots of ground on which they may be situated, shall be subject to the execution of any **creditor of such county.**"

This statute gives the judicial power full control over actions against counties to the end of "**final judgment and execution,**" and, as shown by the case of Givens *vs.* Daviess Co., 107 Mo., 608, no demand other than the suit in the circuit court was required to be made upon the county court.

Defendant seeks to limit the word execution to the issuance of an ordinary writ of execution at law. The word "execution," as used in that statute, could have had no such restricted meaning.

The statute did not contemplate only the ordinary general execution commanding the sheriff to levy on the goods and chattels of the debtor, etc., but included all means by which judgments or decrees of courts are enforced to the end of payment to the creditor.

The Supreme Court of Missouri has construed the word "execution" as follows:

> "But the term **execution cannot be LIMITED** to a writ issued out of a court to enforce what is ordinarily understood to be a final judgment, having for its purpose the enforcement or carrying into effect that judgment. The term execution as employed in the statute is not to be construed in the restricted sense of process simply to collect the amount due on the judgment by levy and sale; **it embraces all the appropriate means to execution of the judgment, ALL MEANS BY WHICH THE JUDGMENTS OR DECREES OF COURTS ARE ENFORCED, ALL PROCESSES ISSUED TO CARRY INTO EFFECT THE FINAL JUDGMENT OF A COURT**; and it is sometimes used as the equivalent of the order of sale."
>
> Orchard *vs.* Stove Co., 225 Mo., *l. c.* 467-8.

We are well aware that the particular statute of Missouri printed in our brief at page 145 related to receivers in attachment proceedings, but the county was not even exempt from that drastic proceeding. We are not asking for a receiver under that attachment proceeding. We printed that statute

to show that this municipality **was not exempt from any remedy applicable to the ordinary debtor** except that the court-house, jail, and clerk's office were exempt from seizure. The courts of Missouri assert constantly, independently of statute, their "power, **as inherent in the court**, to appoint receivers and not dependent upon any statute." No statute **deprives** the court of that power; hence it had the authority to make the appointment in that case."

Cox *vs.* Volkert, 86 Mo., 511.

These statutes are quoted to illustrate what are the "**principles and usages of law**" applicable to the defendant; to show that the county is **not** exempt from any of the remedies applicable to other debtors in ordinary attachment and execution proceedings, and, *arguendo*, not being exempt in such cases, the county is not exempt (in the absence of a special exemption) from the application of the power of the court to appoint receivers in equity proceedings.

As proceedings in equity against municipal corporations wherein courts of Missouri have applied ordinary equitable remedies (in addition to cases already cited) see Lime and Cement Co. *vs.* Citizens Bank and City of St. Louis, where a fund in the treasury of the city was subjected to the plaintiff's claim, the Supreme Court saying, in 158 Mo., *l. c.*, 280:

> "The right which the plaintiff seeks to establish in this suit is in its nature such as can be established only in a court of equity.
>
> "Plaintiff has no legal title to the fund received by the city, but it has, with all others similarly situated, a right to have that fund appropriated to the uses to which it was designed by the contract for which it was received by the city; this right it derives from the contract between the city and the construction company, the contract **on the faith of which the plaintiff extended the credit.**"

And in the case of the City of St. Louis to the Use of Glencoe Lime and Cement Co. *vs.* Von Phul, 133 Mo., 561,

permitted a subcontractor to sue in the city's name to his use upon a bond given by a general contractor to the city, the court says, at page 566 in that case:

> "Through considerations of public policy the law has made no provision by lien or otherwise for the protection of the laborer and materialmen for labor employed or material used in improving the public streets. **But it cannot be denied** that the same equity exists, and that the same moral obligation rests upon the city to protect those who improve its streets as rest upon those making private improvements. Individuals clothed with public functions, even when constituting a corporation, are no more excused from moral obligations than when acting in a private capacity."

The cases cited in plaintiff's brief show that there is no distinction in equity between a fund which has been collected by the trustee and a fund which the trustee has the right and duty to collect, **except** that if **uncollected** the right of the person for whose benefit the fund was designed has that much **greater cause and right** to resort to a court of equity for relief.

See the reference to the case of **The Bankers**, referred to at pages 438 and 439 in Chisholm *vs.* Georgia, 2 Dallas, where it is stated that—

> "the court had a right to direct the issues of the exchequer **as well after the money was deposited there as while** (in the exchequer language) **it was in transitu.**"

As to what law governs the contract—whether the law in force at the time the charter was granted, the law in force at the time the subscription to the bonds was made, or the law in force at the time the bonds were actually issued—is of little consequence, as no substantial change in the terms or manner of determining the tax was made from 1855 to 1871.

The following cases hold that the special charter granted this railroad company conferred contract rights (including contract remedies), as of the date of the charter, which were not repealed by subsequent provisions of the Missouri Constitution of 1865 and the acts of the legislature:

State *ex rel. vs.* Macon Co. Court, 41 Mo., 453.
Chilicothe and B. R. R. Co. *vs.* City of Brunswick, 44 Mo., 553.
Barrett *vs.* Schuyler Co., 44 Mo., 197.
State *ex rel.* St. J. & I. R. R. Co. *vs.* Sullivan Co. Court, 51 Mo., 522.
Smith *vs.* Clark Co., 54 Mo., 58.
State *ex rel.* Baker *vs.* Green Co., 54 Mo., 540.

The bonds having been issued at the time this doctrine was the declared law of the State, and the Supreme Court of the United States having adopted the same, a rule of property was declared which could not be effected by a change in the ruling by the State court, which occurred in 1878.

County of Ralls *vs.* Douglass, 105 U. S., 728; *l. c.*, 731-732.
Seibert *vs.* Lewis, 122 U. S., 284.

The defendant seems to contend that because the "plaintiff voluntarily became the owner of the judgment he now claims," at a recent date, that he is not entitled to the benefits of this rule of property. It needs little authority to show that appellee is in error in this respect. The former judgments conclusively settled the rights of the judgment holder and his assignee succeeded to all of his rights.

Scotland *vs.* Hill, 132 U. S., 116 and 117.

The case of Smith *et al. vs.* Clark Co., 54 Mo., 80, expressly held that the legislative act granting a special charter to a railroad company, with the privilege of receiving subscriptions thereafter to the capital stock of the railroad

company without taking a vote of the people, was not repealed by the provision of 1865 requiring an election to be held before a subscription could be made. It was therein expressly held that this right in companies holding charters granted prior thereto was not taken away by the subsequent legislation. Practically the same laws in force in 1871 were in force prior thereto and the section 17 of art. II of Wagner's Mo. Statutes, being section 17 of chapter 63 of G. S. of 1865, is applicable, with the exception of the added clause, "*Provided*, that two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." As to the Laclede & Fort Scott R. R., that particular cause is inapplicable.

Smith *vs.* Clark Co., 54 Mo., 80.
State *ex rel. vs.* Greene Co. 54 Mo., 540.
Scotland Co. *vs.* Hill, 132 U. S., *l. c.*, 112.
Livingston Co. *vs.* Portsmouth Bank, 128 U. S., 114.

The defendant in its brief, it seems, fails to recognize that a national court, within the same district, is a court of equal power (in controversies over which the Constitution and Congress have conferred jurisdiction), and administers law and equity, applies jurisprudence, and exercises judicial power to the same ends and with equal effect as does the court of general jurisdiction of the State. Whether in cases necessary to enforce its jurisdiction when courts of the State may attempt to destroy the obligations of contracts the national court may not exercise greater powers and control the State court of general jurisdiction it is not here necessary to consider, for the State court of general jurisdiction, to wit, the circuit court, does not deny the power and jurisdiction of the national court.

In the prosecution of a claim against a county the circuit court of the State, under the powers conferred by the Missouri statutes, might enforce its judgment by ordering the officers, agents, or boards herein concerned, over all of whom

it has full supervision and control, to make a levy of taxes, and if that levy be not made when ordered by said court of general jurisdiction said court might, if its order be disobeyed (and the order of such **State** court has never yet been disobeyed) enforce its order by entering of record an order of levy or by treating **that as DONE which should have been done.**

The whole matter of taxation and revenue in Missouri, when the legislature authorizes a tax, or by proper legislation, as here, creates a fund to be raised by taxation, is the concern of the judicial power. The case from Missouri Reports cited by defendant, which holds that the entry of a tax by a clerk, in the **absence of a judicial determination** that the tax should be levied, is not in point. In the case at bar are repeated judicial determinations of a levy. The United States court is as competent to determine that this special tax should be levied, and to **declare that it is levied,** as is the State court of general jurisdiction, and the highest judicial authority of that State has declared that a final judicial determination and order for a levy by the United States court is conclusive.

As an instance of the specific direction and order for a levy of a tax by the circuit court (where the county court had made no specific levy and no request for a definite levy) see State *ex rel.* C. & A. Ry. Co., 165 Mo., 604 and 607, and where levy was made by clerk by order of State auditor, when law fixed levy, without intervention of county court, see instance in State *ex rel vs.* Clerk Jefferson Co. Ct., 41 Mo., 588.

And for the power of the circuit court to enforce a levy which it might order, if the county court should refuse, see section 11417, R. S. of Mo., 1909 (page 143, Appellant's Brief). Is there any doubt that under such circumstances the State circuit court might treat that as done which should have been done—not only as to the levy, but as to every other duty required—and proceed accordingly to the end of satisfaction of the persons entitled to the tax?

It is true, as appellee says, that the application of this particular statute, now otherwise in full force, to judgments of the United States courts has been held unconstitutional by the Supreme Court of the United States, but how does that help the appellee? The application of that statute, in so far as the application of any particular part of it may, in any substantial manner, hinder, defeat, or delay the right of a judgment creditor to any remedy which he may have, is **alone wherein it is unconstitutional.**

This statute by its terms includes taxes to pay such a judgment as plaintiff has. It is only because there is by such statute imposed certain precedent requirements not imposed upon the plaintiff when his rights accrued that this statute, in its application to him of such **hindrances,** is unconstitutional.

These present statutes and all others since 1859 are material as conclusively demonstrating that the laws of Missouri vest in the judicial power of the State full power to impose taxes and enforce their collection when the payment of the tax is authorized by the legislature and is a contract duty, and full power of enforcement of all judicial orders and decrees to the end of complete satisfaction to the creditor by every known legal and equitable remedy.

Therefore it conclusively follows that in cases where the United States courts have acquired lawful jurisdiction the exercise of powers and the adoption of means, methods and processes necessary to the accomplishment of the same end is "agreeable to the usages and principles of law."

The cases of Watts *vs.* Waddle and McGoon *vs.* Scales, cited in appellee's brief, from which counsel argues that if this tax be imposed and enforced against lands the United States courts will be unlawfully interfering with devolution of titles to land, have no relevancy. **Those cases involved** questions of jurisdiction of courts sitting in one State and ordering transfers in another. The district court in the case

at bar is exercising its jurisdiction in the proper district. We call the attention of the court to the reasoning in—

Chisholm *vs.* Georgia, 2 Dallas, 419.

The County of Dallas cannot be elevated by its unauthorized agents who are defying the laws of the State of Missouri and the Constitution and laws of the United States to the dignity of a sovereign State. The sovereign State of Missouri has subjected this county, its agents, and the taxpayers therein to the control of the judicial power and to the control of the judicial power of the United States. The case of Chisholm *vs.* Georgia decided in 1792 the right of an individual to sue the State and the subjection of the State to control by the national judiciary.

The 11th Amendment subsequently exempted **States** from such suits, but it did **not** exempt this county.

The language of the judges, printed at pages 450 to 477, upon the powers and duties of United States courts is applicable today to all cases except where the State is a party. The ancient jurisdiction of equity courts is therein examined and the jurisdiction of equity over the administration of charges lawfully created against **even** the hereditary excise of the King is shown to have been exercised. The duty of protection of the rights of individuals against the arbitrary denial of right by law-defying and law-subverting persons is there declared: the power and duty to frame process and devise means to the end of enforcement of judgment is announced.

Mr. Randolph, the Attorney General, said in speaking of the possibility of the **STATE** opposing execution:

> "But that any **State** should refuse to conform to a solemn determination of the Supreme Court of the Union is impossible until she shall abandon her love of peace, fidelity to compact and character."

At page 464 Justice Wilson translates Bracton's maxim:

> "'It would be superfluous to make laws unless these laws when made were to be enforced'; and 'when the

> laws are plain and the application of them is uncontroverted, they are enforced immediately by the executive authority of government. When the application of them is doubtful or intricate **the interposition of the judicial authority becomes necessary.**' "

It is respectfully submitted that this is a case wherein the necessity for the interposition of an equity court in the enforcement of rights which cannot be denied, in the vindication of the constitutional jurisdiction of courts, in the establishment of justice, and in the promotion of domestic tranquillity, is **apparent.**

As to the defendant, Dallas County, it has been repeatedly decided, and the question is now *res judicata*, that every necessary act, including the election of the voters, and subscription, had been properly had and made prior to the issuance of these bonds. Whatever be the fact as to whether or not the subscription to the bonds was authorized by a sufficient majority of the voters of the county prior to the subscription, and whether or not the subscription was lawfully made by all of the judges of the county court, or by only a majority of the judges: all of these questions have been finally and conclusively adjudicated against the county. These questions were not only raised by the county in every suit on the law side of the court as a defense at law and decided adversely to the county, but they were decided adversely to the county upon the county's own bill in equity, which was carried to the Supreme Court of the United States. See Dallas Co. *vs.* Huidekoper and Dallas Co. *vs.* Davol, Nos. 224 and 226, decided April 5, 1880, 154 U. S., 654 and 655, and Dallas Co. *vs.* McKenzie, decided March 3, 1884, 110 U. S., 686.

In addition, the question of whether the $70,500 should be annually levied as a special railroad tax has been conclusively determined in the *mandamus* and mandatory orders heretofore made from which no appeal was taken.

Under these circumstances it is not considered necessary to reply further to that part of appellee's brief.

The real issue now presented for determination by this court is whether or not a Federal court, in a controversy over which it has undoubted jurisdiction, after making an order which it had undoubtedly power to make, has the power to enforce the order against the will of the defendant. If this suit had been maintained in the Circuit Court of the State of Missouri can there be any doubt, under the statutes and decisions cited, that the action against the county could have been maintained, carried to final judgment and to complete execution of the judgment by the application by the court to the defendant and its agents of every known legal and equitable means which might be applied to an ordinary individual or to a private corporation? Has the district court the same powers or does a citizen of the United States lose these rights and remedies by resorting to the national courts when the Constitution of the United States confers upon him the right to resort to the national court?

HARRY J. CANTWELL,
Solicitor for David Yost, Plaintiff.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 604.

DAVID YOST

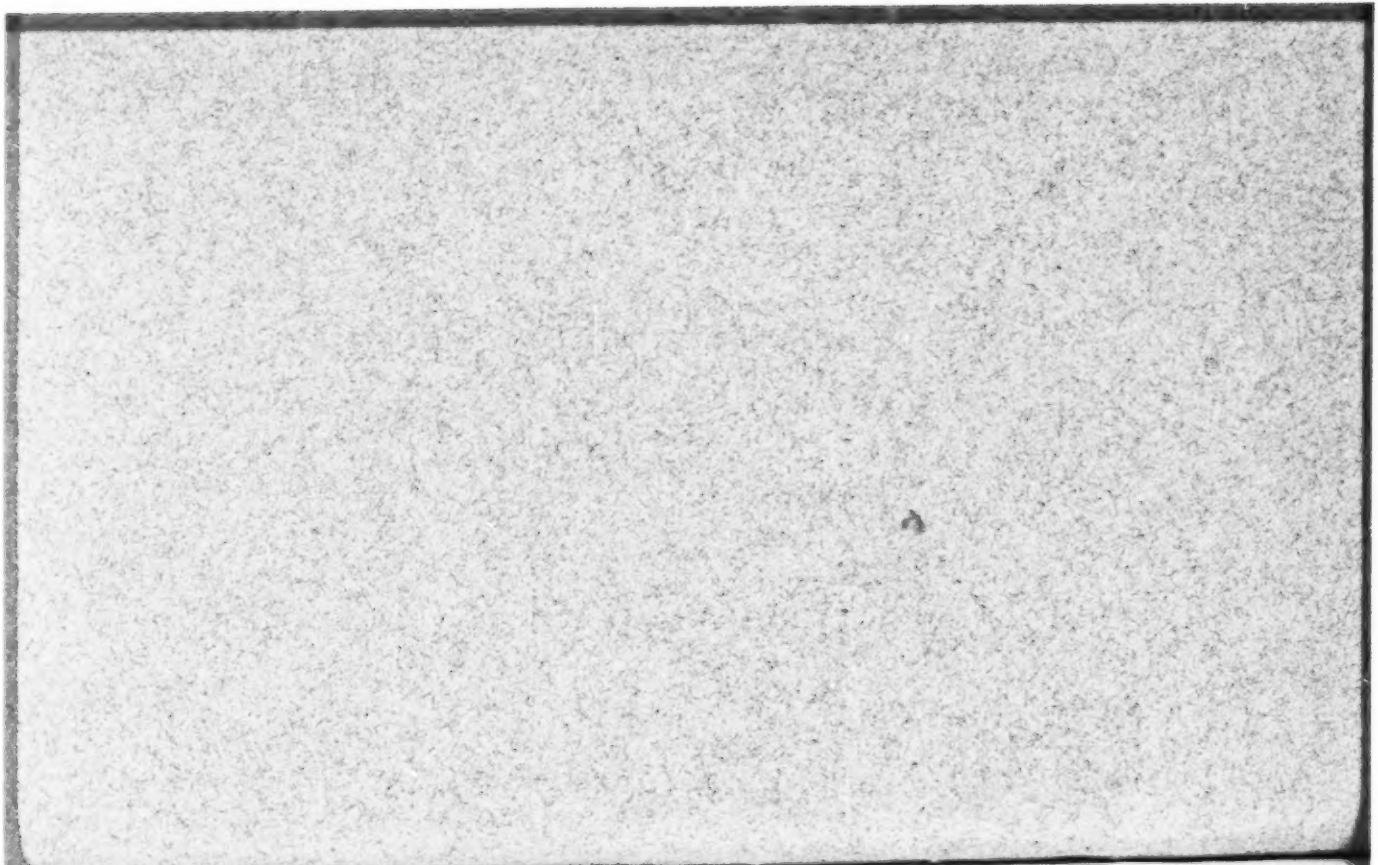
vs.

DALLAS COUNTY.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

ADDITIONAL BRIEF OF DALLAS COUNTY.

JOHN S. HAYMES,
For County.



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ADDITIONAL BRIEF OF DALLAS COUNTY.

Owing to the fact that appellant in his brief in reply has referred to some new matters, including Missouri cases, to which a reference is desired, this additional brief is filed. In it some supplemental authorities are cited and questions referred to.

Remedy Defined.

United States *vs.* Lyman, 26 Fed. Cas., l. c. 1031, Story, J., said:

> "A remedy as understood in legal phraseology is a mode prescribed by law to enforce a duty, or redress a

> wrong, and not an obligation to guarantee a right or indemnify against a wrong."

No Substitute for Taxing Power.

In Thompson *vs.* Allen County, 115 U. S., l. c. 560, this court said:

> "The issue of the bonds on which the judgment was obtained was by virtue of a special statute, and that statute prescribed the mode of levying and collecting the tax."

In that case Mr. Justice Mathews said in the Circuit Court, 4 Ky. Law Report, l. c. 101:

> "The collection of a tax as much belongs to the authority of the State as its levy and assessment, and the reasons which forbid a court to supply the latter, apply with equal force to the former. The tax when assessed, is not a fund which can be dealt with by a court as an equitable asset or chose in action subject to an implied trust. The levy and assessment is a step in a process of which the collection is another, and the proceeding is the only agency known to the law by which the desired result can be effected. The jurisdiction of this court is confined to compelling the State officers to perform their duty under the State laws, *and no substitute can be invented.*"

The Writ of Mandamus Confers No Powers.

It is said the decisions of the Missouri Supreme Court, which hold that the formal levy of a tax in the manner and by the tribunal appointed by law is indispensably necessary to its validity, do not apply here, because no court had ordered the levy in those cases, while in the case at bar the levy has been judicially required by the writ of mandamus. The effect of such a contention is: That when the legislature has conferred the power to make the levy its requirement is mandatory, but when to this is added the command of a

court that the legislative will be executed, that will may then be disregarded! Mandamus creates no such power.

United States *vs.* Clark County, 105 U. S., l. c. 773, expresses it:

> "Mandamus does not confer power upon those to whom it is directed. *It only enforces a power already existing.*"

New Missouri Cases.

The case of State *ex rel. vs.* Clerk Jefferson Co., 41 Mo., 588 (1867), is cited in reply (p. 8). In that case there had been an omission in 1863 in Jefferson County to levy the military tax provided for by the statute. The action was mandamus to require the county clerk to make a supplemental tax-book for the year omitted, and at page 589 the court quotes section 75, act of 1866, which is the authority for the proceeding. The court said:

> "This section expressly provides that when for any cause there has been a failure to levy the proper rate of taxes, or any portion of them, in any county, for any year or years, the clerk for the time being shall make a supplemental tax-book for such year or years when officially notified by the auditor."

Thus the express legislative authority was present.

In State *ex rel. vs.* C. & A. Ry. Co., 165 Mo., 597, cited in reply (p. 8), the county court had made a preliminary order for authority from the circuit court to levy additional tax, but did not specify the additional tax desired, and the Supreme Court said (p. 609) the statute did not in terms require it.

Orchard *vs.* Stove Co., 225 Mo., 467: Under the law of Missouri land of a deceased person may be sold by his administrator under the order of the probate court for the payment of his debts. In this case a deceased had left an unexpired three years' lease upon certain land, and the court said that section 3172 of the Missouri Statutes of 1899 pro-

vided that "every lease upon lands for any unexpired term of three years or more shall be subject to execution and sale as real property," and held that the lease could be sold under the order of the probate court indicated above. It is to that question and section that the opinion refers.

The section of Missouri law quoted on page 2 of reply brief was to permit action to be prosecuted against counties in the circuit court which, doubtless, without such authority could not have been done.

No Vote to Issue Bonds.

Since the force of the judgment upon which this action is founded has not been questioned by defendant in this case we are unable to see the materiality of the reference on page 11 of the brief in reply to "the election of voters" "prior to the issuance of the bonds," and whether the "subscription to the bonds was authorized by a *sufficient* majority of the voters of the county." Besides, in Dallas Co. *vs.* McKenzie, 110 U. S., 686, cited on same page of brief, it is said:

> "There was no vote of the taxpayers of the county to authorize the subscription."

Extent of Indebtedness.

In the certificate sent here it is said plaintiff's judgment amounts to more than $1,000,000. In the bill it is stated that its amount is $1,023,000, with interest on $241,400 at ten per cent; on $398,600 at seven per cent, and on $382,000 at six per cent, from October, 1908, and that there are other judgments against the county. It is further alleged in the bill that "even though the full sum of $70,500 be annually collected and devoted to that purpose, the said debt can never be paid, unless the same shall be paid out of an unexpected increase in the general values of the taxable wealth of the county."

The judgment, of course, is not impeached because the debt was not authorized by the vote of the taxpayers, nor because nothing was received by the county by reason of its creation, nor yet by the inability of the county to pay it; but the latter fact, at least, may well be considered by a court of chancery in determining whether it possesses the power to send its agent on a mission, "the end of which no wisdom can foresee." In fact one that, according to the bill, can very probably have no end.

JOHN S. HAYMES,
For Dallas County.